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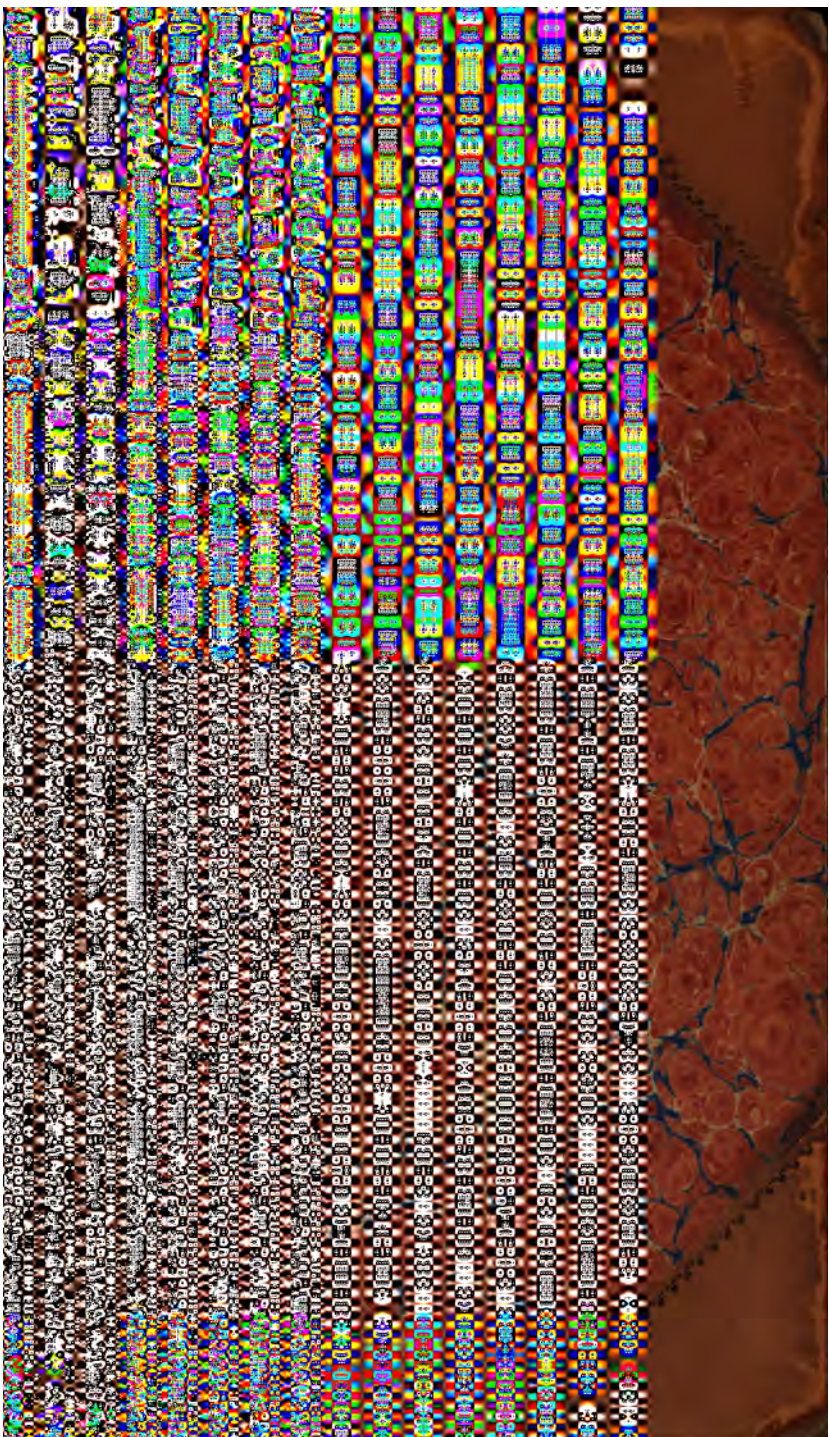
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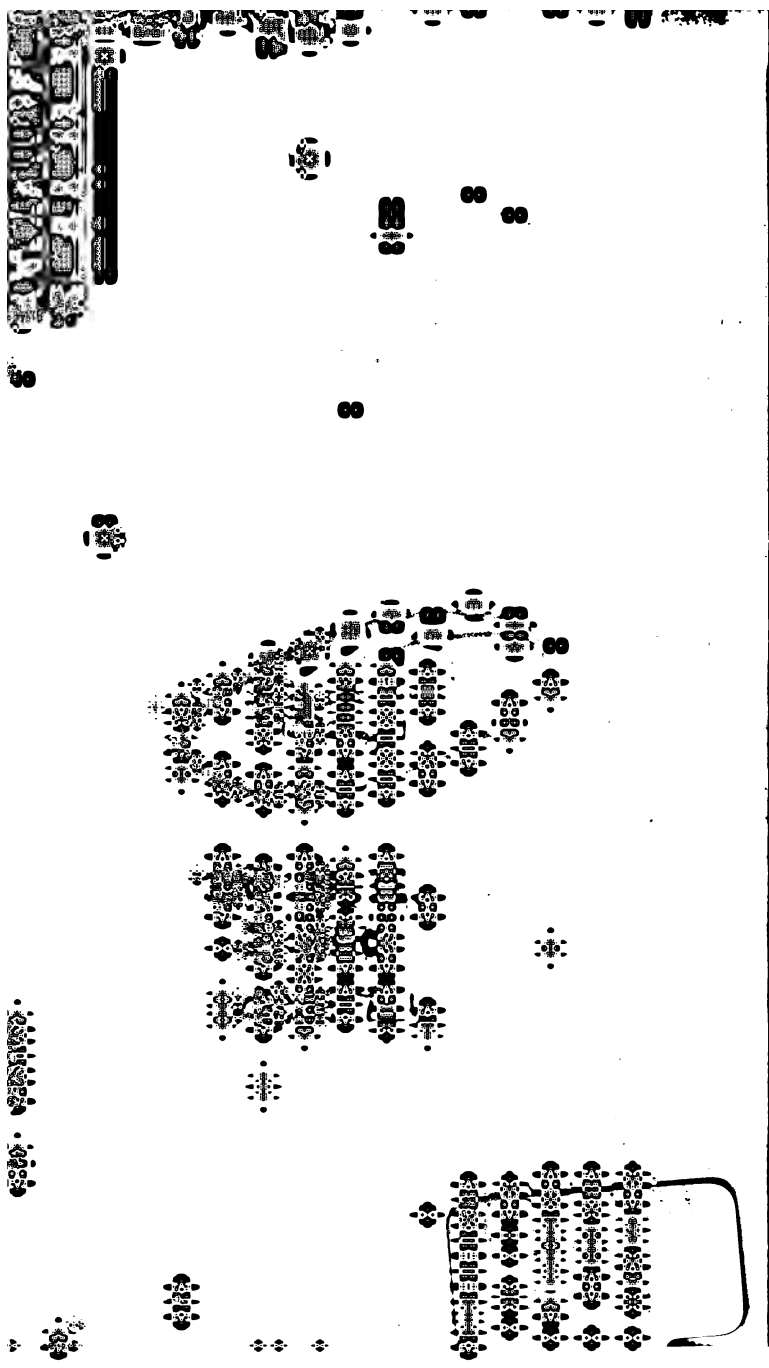
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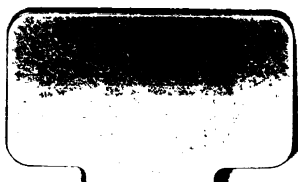


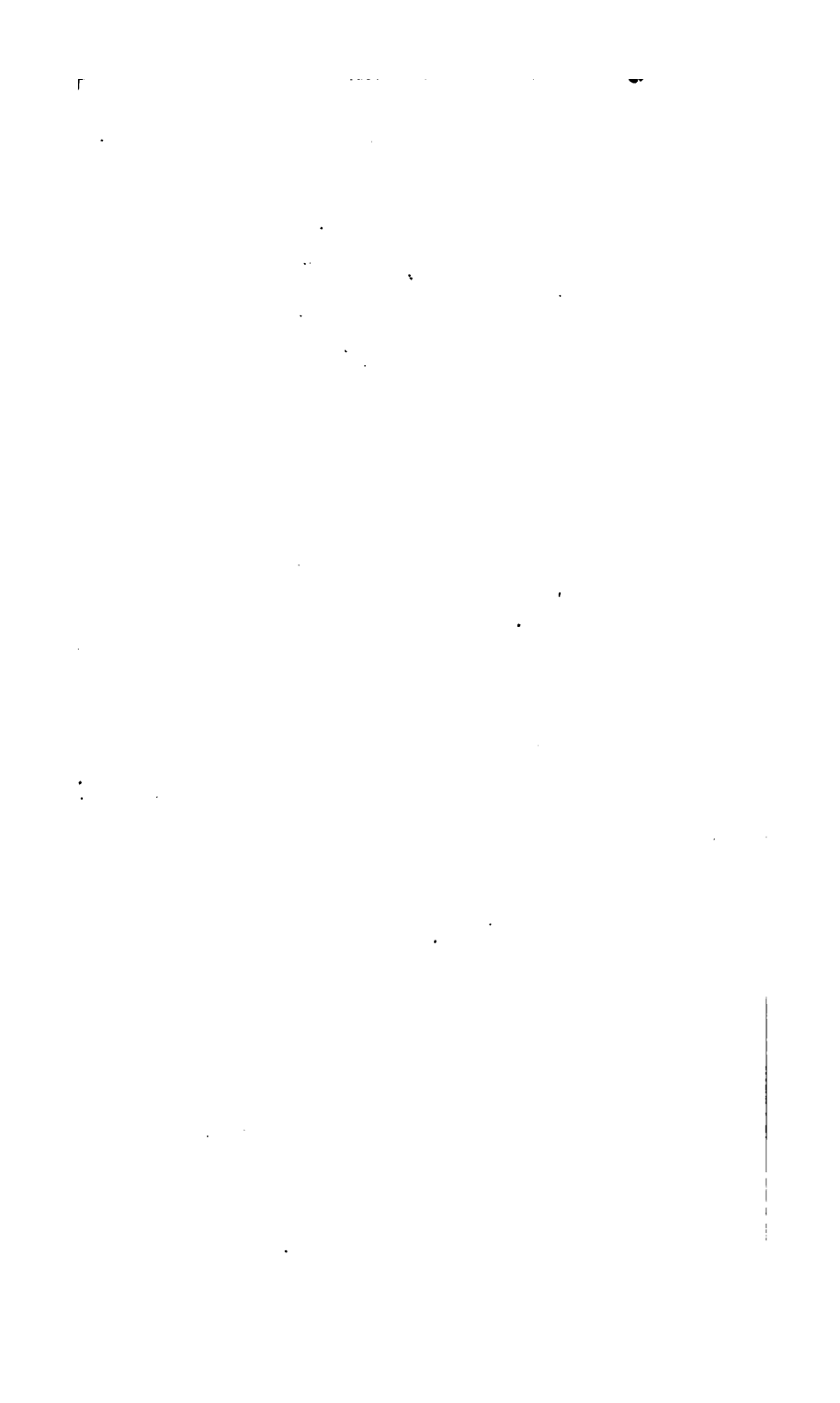
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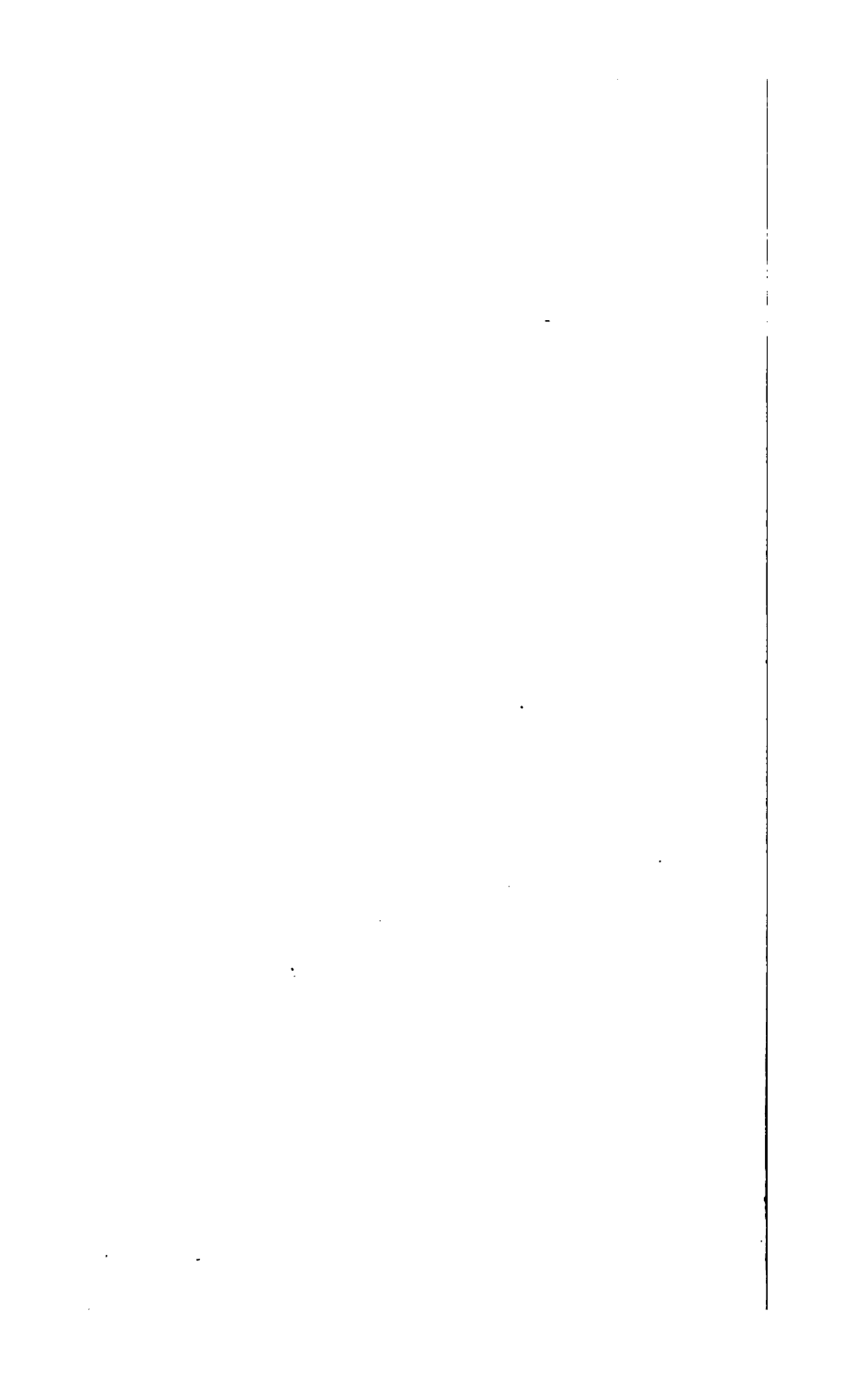
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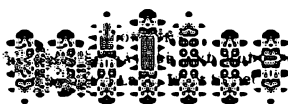
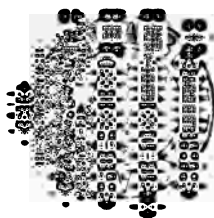
A TREATISE
ON THE
LAW RELATING TO MINES.

BY R. P. COLLIER,
OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW ;
RECORDER OF PENZANCE.

LONDON,
WILLIAM BENNING & Co., LAW BOOKSELLERS,
43, FLEET STREET.

1849.

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TO

HIS ROYAL HIGHNESS PRINCE ALBERT,

THE LORD WARDEN OF THE STANNARIES,

&c., &c., &c.

THIS TREATISE

IS

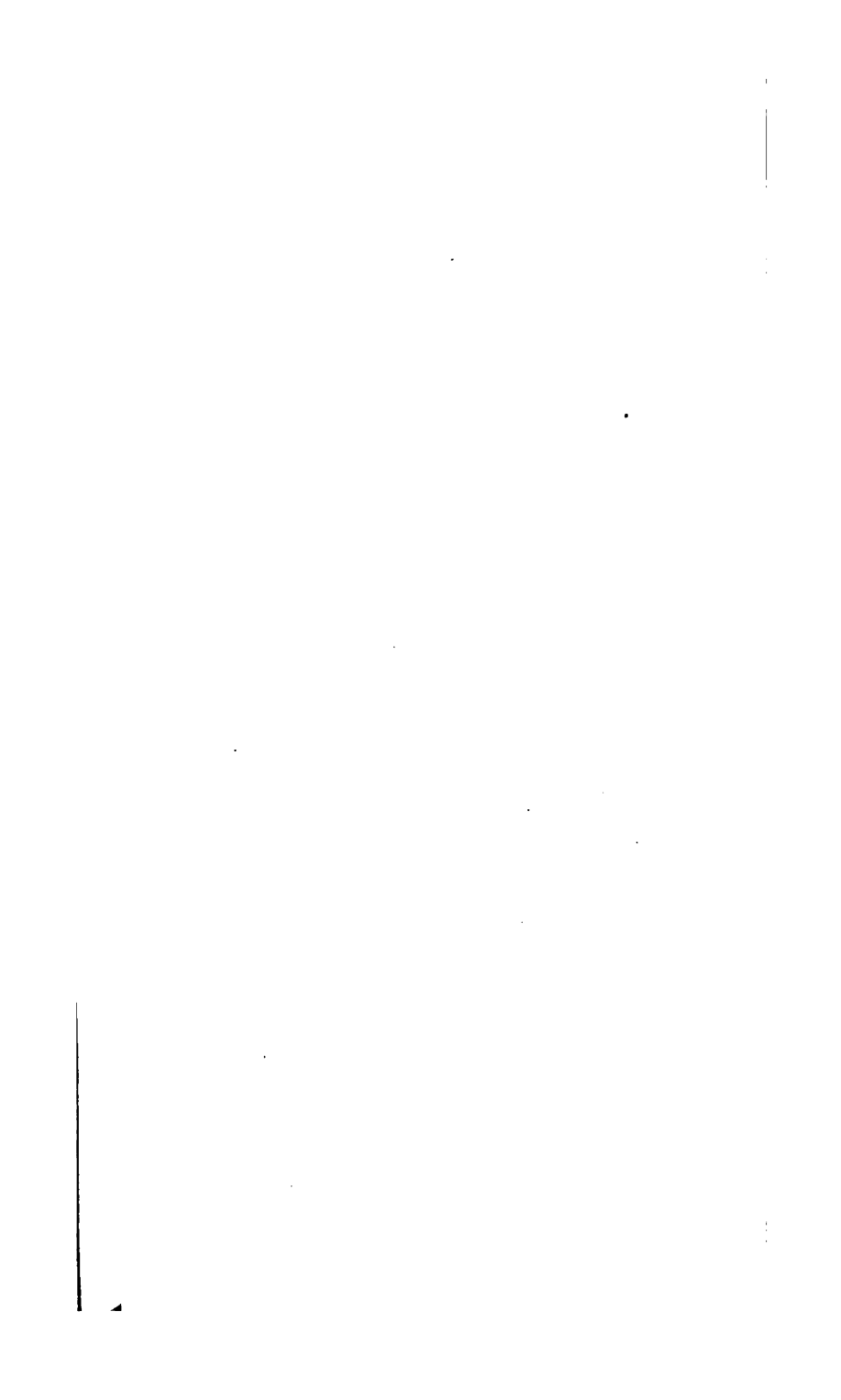
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RESPECTFULLY DEDICATED,

BY HIS ROYAL HIGHNESS'S

OBEDIENT AND HUMBLE SERVANT,

THE AUTHOR.



PREFACE.

THIS Treatise is intended to contain a summary of those principles of Law and Equity which govern the acquisition and transfer of property in Mines, and the duties, rights, and liabilities of Mine-owners and Adventurers, arising out of their relations among themselves and to the Public. The Statutes bearing upon these questions, directly or indirectly, as well as those which regulate the employment of labour in Mines, and the relations of masters with their workmen, and punish criminal offences against mining property, have been noticed ; and the substance has been given of every decided case of which the Author is aware interpreting those Statutes, or illustrating the application of legal or equitable principles to Mining transactions. The peculiar customs of Cornwall and Devonshire,

and the cost-book system of Mining, which have been much discussed in the Courts, though little by text writers, have been treated of at some length. A short exposition has been attempted of the valuable jurisdiction and practice of the Stannaries Court; and the Acts of Parliament constituting that Court and prescribing its functions, together with its published Rules and Regulations, have been printed in the Appendix.

R. P. COLLIER.

*4, Harcourt Buildings, Temple,
July, 1849.*

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THE LAW OF MINES.

CHAPTER I.

OF THE PROPERTY IN MINERALS AND THE RIGHT TO WORK FOR THEM.

SECTION I.

THE property in minerals unsevered from the land, whether held together with or separately from the property in the land, is what the law terms a corporeal hereditament, as distinguished from the mere right to work for them which is an incorporeal hereditament (*a*).

The property in gold and silver mines has been from time immemorial claimed by the Crown by virtue of its prerogative (*b*), and an appendant right has been

(*a*) Co. Litt. 4, *b*.

(*b*) The reasons assigned for this in the "case of mines," Plowden, 310, may be less satisfactory at the present day than they seem to have been considered in the reign of Elizabeth. "The common law, which is founded upon reason, appropriates everything to the persons whom it best suits, as common and trivial things to the common people; things of more worth to persons of a higher and superior class; and things most excellent to persons who excel all other; and because gold and silver are the most excellent things which the soil contains, the law has appointed them, as in reason it ought, to the person most excellent, and that is the king." See Pettus Fodinae Regales.

contended for to enter and search for these metals in the lands of any subject (*d*). There is some reason indeed for believing that the Crown once laid claim to all mines (*e*); and it is well known that in comparatively recent times attempts have been made to comprise within the prerogative all of copper and tin, on the ground that those ores necessarily contain some portion of gold or silver. The enjoyment, however, of all mines in which tin, copper, iron, or lead are found, notwithstanding any quantity of the precious metals intermixed, was secured to the subject in the reign of William and Mary (*f*). The right of the Crown to mines in which gold and silver are found unaccompanied by these metals, and mixed with others, would, if the case should arise, be a matter of some doubt; such rights, however, as well as those to pre-emption, which still exist under certain circumstances, and to mines of pure gold and silver, seem too remote to call for discussion in this treatise.

Apart from the claims of the Crown, the property in minerals is *primâ facie* in the owner of the fee (*g*) of the land, whether in possession, remainder, or reversion, and whether his estate be subject to a term of years under a lease, or to a copyhold or customary (*h*) tenancy

(*d*) Cullen v. Rich, Bull. N. P. 102; 2 Str. 1142. R. v. Earl of Northumberland, Plowd. 310, 336. Lyddal v. Weston, 2 Atk. 20. Seaman v. Vandrey, 16 Ves. 393.

(*e*) See Mr. Smirke's observations on Vice v. Thomas, p. 79.

(*f*) 1 Wm. & M. c. 30; 5 Wm. & M. c. 6.

(*g*) Co. Litt. 4, b.; 2 Bl. Com. 18. Curtis v. Daniel, 10 East, 273. Scriven on Copyh. 509. Bames. v. Mawson, 1 Maul. & S. 84.

(*h*) The rule holds equally whether the land be held at "the will of the lord" or "according to the custom of the manor," for even in the latter case, of what is commonly called "customary freehold," the freehold *tenure* is in the Lord. Gilbert on Tenures, 327. Doe d. Reay v. Huntingdon, 4 East, 271. Brown v. Rawlins,

vested in other persons. But the property in minerals is not necessarily accompanied by the right to work for them: indeed, except where the owner of the fee is in possession, the minerals are, without agreement, prescription, or custom, accessible to nobody: for the tenant not possessing the property in them cannot open a mine without committing waste (*k*); (though he may dig an open one) (*k*) the reversioner or Lord of the manor cannot enter and dig, because he has not the possession of the surface, or even of the subsoil (*l*). If, however, minerals be severed, they become chattels which he has a right to seize and carry away, and for which he may support trover (*m*): he has also the right to open mines in common or waste lands of the manor, for the tenants have not the possession of the land, or any other

7 East, 409. *Rutland v. Greene*, 1 Keen, 557. *Bourne v. Taylor*, 10 East, 189. *Winchester v. Knight*, P. Wms. 407.

(*k*) Co. Litt. 53, b. 54, b. *Manwood's case*, Moore, 101. *Astray v. Bahard*, 2 Mod. 193. It has been said, however, that a lessee may dig coal, iron, &c. for his own use without selling them; 2 Roll. Abr. 816. A tenant for life may undoubtedly dig gravel, clay, marl, &c. for necessary repairs, or manure without committing waste; Co. Litt. 53, b. 54, b. *Moyle v. Moyle*, Owen, 67, and he may work opened mines; Co. Litt. 54, b. *Sander's case*, 5 Co. 12. *Whitfield v. Bewit*, 2 P. Wms. 240. *Lord Darcy v. Astwith*, Hob. 296; Hutt. 19. As to the extent to which he may carry his works, see *Clavering v. Clavering*, 2 P. Wms. 388; Selw. Ch. Ca. 79. *Houghton v. Leigh*, 1 Taunt. 410. A tenant for life without impeachment of waste, may of course open mines. The difference is little between the right of tenant for years and for life; Co. Litt. 41, b. *Mitchell v. Dors*, 6 Ves. 147. *Hanson v. Gardiner*, 7 Ves. 398. As to whether mortgagee in possession would be restrained from opening mines, see *Hanson v. Derby*, 2 Vern. 392. *Hetherington v. Bankes*, Selw. Ch. Ca. 31. And as to rights of mortgagee generally, see *post*, Chap. III.

(*l*) *Lewis v. Braithwaite*, 2 B. & Ad. 437.

(*m*) *Rowe v. Brenton*, 3 Man. & Ry. 133; 8 B. & C. 737; see also *Player v. Roberts*, W. Jones, 243. *Bishop of Winchester v. Knight*, 1 P. Wms. 406.

interest than the right to take the herbage by the mouths of their cattle, and it seems that the destruction of the herbage, if not wanton or unnecessary, gives the commoners no right of action against him (*m*). This property of the lord in the minerals is not in the nature of a seigniority or royalty, but the minerals are part of the demesnes of the manor, and will pass by a grant of wastes, or enfranchisement of copyhold lands, unless expressly reserved, notwithstanding a reservation of all seigniories, royalties, and jurisdictions (*n*). The right of the lord to minerals does not extend to the lands of free tenants of the manor (*o*). Minerals found on the sea shore, which has been defined to be the accessible space, below the ordinary high water mark, *primâ facie* belong to the Crown; those between the ordinary and extreme high water mark to the owner of the adjoining freehold; in land formed by the casting up of alluvial matter they belong to the lord of the manor; in land suddenly left by the retirement of the sea to the Crown; in every case following the fee (*p*). With respect to lands held in right of the church, of which the fee is said to be in abeyance, it still admits of some doubt, whether ecclesiastical persons can open new mines without committing waste,

(*m*) As to what amounts to proof of a waste being portion of the soil and freehold of a manor, see *Tyrwhit v. Wynne*, 2 B. & Ald. 554.

(*n*) *Townley v. Gibson*, 2 T. R. 701.

(*o*) *Barnes v. Mawson*, 1 Maul. & S. 77. The free tenants of the Duchy of Cornwall always claimed the minerals; *Rowe v. Brenton*, *supra*. The late act for enfranchising *conventional* tenements of the Duchy (seventeen assessionable manors) reserves the minerals to the Duchy with power of entering and working for them; 7 & 8 Vict. c. 105, confirmed by 11 & 12 Vict. c. 83.

(*p*) *Lowe v. Govett*, 3 B. & Ad. 863. *R. v. Lord Yarborough*, 3 B. & C. 91; 4 Dowl. & R. 790; 5 Bing. 103.

although they may unquestionably work old ones. Rectors and vicars, however, could only be restrained (if at all) by the Patron, and Bishops by the Crown (*g*). Even if they could open mines themselves, it seems questionable whether they could transfer the right to others (*r*).

Sec. II. The property in minerals, and the right to search for them may be vested in other persons than the owner of the fee, by Alienation, by Prescription, or by Custom.

I. The power of raising minerals may be alienated, either by such a conveyance as confers an estate in them, whether freehold or chattel in its quantity, or by such as merely confers a right to dig, importing no property in them until severed from the soil (*s*). An estate in minerals is considered an estate in land, and is transferable only under the same restrictions, whether conveyed with or without a conveyance of the adjacent soil; if conveyed without the land, no amount of non-user, will, it seems, be a relinquishment by the owner of them in favour of the owner of the land (*t*),

(*g*) Co. Litt. 644, 645, 646, 648; Co. Litt. 341, *a*. 341, *b*. 44, *a*. Bishop of London *v.* Webb, 1 P. Wms. 527; Cro. Car. 253; 2 Roll. Abr. 813; 35 Edw. 1, Rot. Parl. vol. 1, p. 198, No. 46. Liford's case, 11 Co. 49. Stockman *v.* Wither, 1 Roll. 86; 2 Bulstr. 279. Acland *v.* Atwell, 2 Roll. Abr. 813. Rutland *v.* Greene, 1 Keb. 557; 1 Sid. 152; 1 Lev. 107, (where the Court granted the patron a rule for a prohibition for the purpose of trying the right, expressing however an opinion that the parson might open a mine); see, however, Wither *v.* Dean and Chapter of Winchester, 3 Mer. 427. See also Knight *v.* Moseley, Amb. 176. Theachy *v.* Francis, 2 Atk. 217; Barnard. 299. Tifferson *v.* Bishop of Durham, 1 Bos. & Pull. 111, 125; Bainbridge on Mines, 223.

(*r*) See this question discussed in Bainbridge on Mines, p. 62—69.

(*s*) Co. Litt. 42, *a*.; Blackst. Com. vol. 2, p. 121. Brewer *v.* Hill, 2 Anstr. 413. Hewlins *v.* Shipham, 5 B. & C. 229.

(*t*) Seamon *v.* Vaudrey, 16 Ves. 390.

or constitute adverse possession on his part, so completely separate are the estates.

The Statute of Frauds (†) enacts, that “all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, and out of any messuage, manors, lands, tenements, and hereditaments, made and created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either at law or in equity, be deemed or taken to have any or other greater force or effect, any consideration for making such parol leases to the contrary notwithstanding.” The second section excepts all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term, shall amount to two-third parts at least of the full improved value of the thing demised.

The 3rd section enacts, that “no leases, estates, or interests, either of freehold or terms of years, shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto *lawfully authorized by writing*, or by act and operation of law.”

The 4th section enacts, that “no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing and

(†) 29 Car. 2, c. 3, s. 1.

signed by the party to be charged therewith, or some other person thereunto by him *lawfully authorized*."

As, practically, mines seldom or never come within the exception of the 2nd section relative to lands "of which the rent reserved is full two-thirds of the improved value," it may be laid down generally, that the Statute of Frauds permits no legal interest in them beyond that of a tenancy at will to be created or transferred, otherwise than by writing.

Stat. 8 & 9 Vict. c. 106, s. 3, enacts, that "a feoffment made after October 1, 1845, other than a feoffment made under a custom by an infant, shall be void unless evidenced by deed, and that a partition and an exchange of any tenements or hereditaments, not being copyhold, and a lease (v) required by law to be in writing of any tenements or hereditaments, and an assignment of a chattel interest not being copyhold, in any tenements or hereditaments, and a surrender in writing of any interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which by law might have been created without writing, made after 1st October, 1845, shall be void at law."

Sect. 2 makes the freehold of corporeal hereditaments to lie in grant, and be conveyable in the same manner as that of incorporeal, and provides that every deed which by force only of that enactment shall be effectual as a grant, shall be chargeable with the stamp duty with which the same deed would have been chargeable if it had been a release founded upon a lease or bargain and sale for a year, and also with the same stamp duty (exclusive of progressive duty), with which such

(v) An act (7 & 8 Vict. c. 76) was in operation for one year requiring all leases in writing to be by deed.

lease or bargain and sale for a year would have been chargeable

The effect of this statute, combined with that of the Statute of Frauds, is to make a *deed*, *i. e.* an instrument under seal, necessary to the creation or transfer of any legal estate in unsevered minerals beyond a tenancy at will, or a term less than three years, at a *rent* (*v*) of two-thirds of the value.

It will have been observed, that sections 3 and 4 slightly differ in their provisions relative to the manner in which the agent is to be authorized to bind his principal, the latter requiring only that the agent shall be authorized, the former that he be authorized in writing; as, however, a deed is now made necessary in lieu of the writing required by those sections, the distinction no longer exists, for an agent can only be authorized to execute a deed by deed (*w*).

A deed is equally necessary to the conveyance of a right to dig for minerals, on the double ground that such right is an interest in land (though not an estate), and also an incorporeal hereditament (*x*). Nor does it make any difference whether such right be conferred for a term of years only or for life, or to the grantee and his heirs (*x*).

It would be beyond the scope of this Treatise to discuss the forms appropriate to the conveyance of particular interests, and it seems enough to say that those most generally in use are either leases of the minerals, or licenses to dig for them for a term of years (*y*).

(*v*) A *tribute* is not strictly a rent. See p. 57.

(*w*) *Harrison v. Jackson*, 7 T. R. 209. *Appleton v. Binks*, 5 East, 148. *Burchell v. Beavan*, 1 Bingh. N. C. 120.

(*x*) *Hewlins v. Shipham*, 5 B. & C. 221. *Wood v. Leadbitter*, 13 M. & W. 838. *Perry v. Fitzhove*, 8 Q. B. 757.

(*y*) See form of lease, Appendix, p. 27.

This description of license being by deed, and relating to an interest in land, is irrevocable, and is thus distinguished from a parol license which is ordinarily revocable (z).

A lease of the minerals, or a grant of them, carries with it the requisite power to dig for them, all necessary rights of way over the lands of the lessor, the power to erect machinery, &c., and in this respect has the same effect as an express license to work (a); an express reservation also of the minerals has the same effect, although, as we have seen, the implied reservation of them by law to the lessor has not. The interests, however, created by a lease and a license are in some respects different.

A lease is necessarily *exclusive* of the rights of all other persons, vesting the absolute possession of the whole of the subject-matter demised.

A license to work for minerals is not exclusive of the rights of the grantor, unless there be express words of exclusion, but he retains the right to work himself for the same minerals, or to license other persons to do so; and the effect of a reservation on a sale of lands of such a right is the same, not excluding the rights of the purchaser, his heirs and assigns (b). This right has been likened to the right of common *sans nombre* (c). However, in the event of conflicting claims arising out of different licenses, there is some reason to believe that the

(z) *R. v. Horndon on the Hill*, 4 Mau. & S. 565. *Cocker v. Cowper*, 1 C., M. & R. 418. *Liggins v. Inge*, 7 Bingh. 693. *Winter v. Brockwell*, 8 East, 308. *Webb v. Paternoster*, Palmer, 71; 2 Roll. Rep. 152. *Taylor v. Waters*, 7 Taunt. 384.

(a) *Earl of Cardigan v. Armitage*, 3 B. & C. 197; 3 D. & R. 414. See post, c. 2.

(b) Co. Litt. 165, a.; Godb. 18; 1 And. 307; 4 Leon. 147. *Chetham v. Williamson*, 4 East, 469.

(c) Co. Litt. 165, a.

Courts of Equity might interfere to secure the enjoyment of the mine to the party who has been in possession and actually carried on the works (*d*).

A lease, even if unaccompanied by possession, confers an interest for which ejectment will lie, and for the disturbance of which, if accompanied by possession, trespass; whereas neither ejectment nor trespass can be supported for an incorporeal hereditament, the only remedy for interference with it being an action on the case (*e*). Where, however, the licensee is actually working a mine, he may maintain ejectment or trespass (*f*), and trover for the ore and materials, and his position seems little, if at all, different from that of a lessee, *quoad* all persons except the grantor and his heirs and assigns, who, unless expressly excluded by the words of the license have concurrent rights.

In the event of a forfeiture for breach of condition or covenant, a lease can be avoided only by a re-entry on the part of the landlord, if that be possible, or, if impossible, by claim, but a license is determined merely by notice (*g*).

Rent cannot be reserved *eo nomine* on a license, being an incorporeal hereditament, because there is assumed to be nothing to be distrained upon (*h*), unless indeed the landlord be the King;—the reason of which

(*d*) *Norway v. Rowe*, 19 Ves. 156. See this case also as to what words constitute a license, and what a lease.

(*e*) Co. Litt. 57, *a.*; 3 Bl. Com. 51; 3 Woodd. 168; 4 Reeves, 430. As to when a grant of the profits of land amounts to a demise of the land, see Co. Litt. 4, *b.*; *Ib.* 6, *a.* *Parker v. Plummer*, Cro. Eliz. 190. *R. v. Winter*, 2 Salk. 588. *Parramour v. Yardley*, Plowd. 539. *Wheeler v. Toulson*, Hard 330. *Bond v. Pettifer*, Cro. Car. 362. *Throgmorton v. Tracy*, Plowd. 145.; *Keilw.* 188; *Palmer*, 174; 1 Ventr. 393.

(*f*) *Doe d. Hanley v. Wood*, 2 B. & Ald. 724.

(*g*) *Roberts v. Davey*, 4 B. & Ad. 672. As to what is an entry, *Doe d. Hanley v. Wood*, 2 B. & Ald. 724.

(*h*) Co. Litt. 47, *a.* 142, *a.* 144.

Lord Coke explains to be, that the King can by his prerogative distrain in all the lands of his lessee (*i*). This distinction is, however, rather technical than substantial, because a reservation of rent will be good in either case by way of contract, and the sum due, by whatever name it be called, will be recoverable either by action of debt or covenant (*k*), or, in the case of tolls payable in ore, by trover (*l*). Indeed Mr. Bainbridge observes (*ll*), that it may be doubted whether in the case of an actual demise of mines without land, any rent liable to distress can issue: for the works would not be demised, and there would be nothing on the subject of demise to distrain. The payment of tribute is not considered payment of rent, and on this ground it has been held rateable in the hands of the landlord as occupier of the land (*m*). It results from these considerations, that a lease is in whole more favourable to the adventurer than a license or grant; indeed the most proper, and (it is believed) usual form of the deed under which mines are worked, is a lease of the minerals accompanied by a license to do all that is necessary for obtaining them (*n*).

Covenants are construed to run, or not to run, with mines on the principles applicable to covenants relating to land (*o*).

(*i*) Co. Litt. 47, *a*.

(*k*) *Dalston v. Reeve*, *Ld. Raym.* 77.

(*l*) *Crease v. Barrett*, 1 C., M. & R. 919.

(*ll*) *Bainbridge on Mines*, 173.

(*m*) *Post*, p. 56.

(*n*) See a form of lease of minerals with license to search, rights of way, watercourses, &c., Appendix, p. 27.

(*o*) On this subject, see *Sampson v. Easterby*, 9 B. & C. 505; 1 Cr. & Jerv. 105. *Keppel v. Bailey*, 2 Myl. & K. 517; 2 *Sugden's Vendors and Purchasers*, 502. *Spencer's case*, 5 Coke, 16, and notes thereto. *Smith's Leading Cases*, vol. 1, p. 22.

But, although the legal estate in mines, such as would be sufficient to support ejectment, can only be alienated in the manner thus briefly noticed, an equitable interest in them, together with a title to a share of their produce, may be acquired by agreement, either written or spoken, express or implied, attended with equitable rights against co-adventurers, and with legal liabilities to the public (*p*).

It is scarcely necessary to say, that the property in the implements and machinery is distinct from that in the mine, and may or may not be in the same person or persons; and that such machinery, &c. is removable unless attached to the soil: the ordinary rules applicable to the removability of trading fixtures and others between landlord and tenant, executor and heir, executor of tenant for life or in tail against remainderman, apply to fixtures for mining purposes, without any distinction requiring notice (*q*).

The property in minerals, or the right to search for them, may also be vested in other persons than the owner of the fee, by prescription or by custom.

2. Prescription is defined by Lord Coke to be a personal usage, as that such an one and his ancestors or those whose estate he hath, have used time out of mind to have such an advantage or privilege (*r*). Prescription can be claimed only by the owner for the time being

(*p*) See the 3rd Chapter. See also the form of transfer common in cost-book mines in the Appendix. The form confers no legal estate in the mines, but is effective for the purposes above described.

(*q*) On this subject, see *Elves v. Mawe*, 3 East, 38, and note thereto wherein the cases are collected, *Smith's Leading Cases*, 99, 100. As to mining fixtures in particular, see *Dudley v. Warde*, Amb. 113.

(*r*) 1 Inst. 113.

of the freehold, an incorporeal hereditament only can be subject of it, and it must be of origin beyond the time of legal memory.

3. A Custom is a usage of the inhabitants generally of a certain district, and in order to be valid must have had its origin beyond legal memory, have been uninterrupted, and be reasonable. As legal memory was arbitrarily determined to commence at the accession of Richard 1, the difficulty of proving prescriptions or customs to have existed before it increased with the lapse of time, until it became necessary to evade the strictness of the rule which required such proof. Accordingly it was held that proof of the enjoyment of a right as far back as living witnesses could speak, was evidence of enjoyment before the reign of Richard 1, and the cases went even so far as to recognise twenty years uninterrupted enjoyment as conclusive *prima facie* proof. This evidence however was, by the hypothesis, subject to be defeated by any which shewed the origin or suspension of the right within legal memory. These points were established by shewing a grant of the right since the required time, or that it had been extinguished by the land to which it was attached, and that over which it was exercised (termed the *dominant* and *serviant* tenement) being possessed by the same person. These difficulties led to the further expedient of presuming grants in certain cases (*s*), and finally to the Act for shortening the time of Prescription (*t*).

(*s*) See Com. Dig. tit. "Prescription," as to presuming grant of right of way, see *Campbell v. Wilson*, 3 East, 294. As to presuming a right of water, *Wright v. Howard*, 1 Sim. & Stu. 203. And as to the right to the enjoyment of light, *Crow v. Lewis*, 2 B. & C. 689.

(*t*) 2 & 3 Wm. 4, c. 71.

This statute enacts, that "no claim which may be lawfully made at the common law by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the duchy of Lancaster or of the duchy of Cornwall, or of any ecclesiastical or lay person or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall where any such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such right, profit, or benefit was first taken, or enjoyed at any time prior to such period of thirty years, but, nevertheless, such claim may be defeated, in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken or enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Sec. 2. "That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over or from any land or water of our said lord the king, his heirs or successors, or being parcel of the duchy of Lancaster, or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter, as

herein last above mentioned, shall have been actually enjoyed by any person claiming a right thereto, without interruption, for the full period of twenty years, shall be defeated, or destroyed, by shewing only that such way, or other matter was first enjoyed at any time prior to such period of twenty years, but, nevertheless, such claim (v) may be defeated in any other way in which the same is now liable to be defeated ; and where such way, or other matter as herein last before mentioned, shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given, or made for that purpose by deed or writing."

The 4th sect. provides that no act shall be deemed an interruption unless it shall have been submitted to or acquiesced for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made. Sect. 7 allows an additional period for resisting claims to persons under disabilities.

(v) A claim by an owner of a copper mine to sink pits in his own land, to fill such pits with iron, and to cover the same with water pumped from the mine for the purpose of precipitating the copper contained in such water, and afterwards to let off the water impregnated with metallic substances into a watercourse upon the land of another, is a claim to a *watercourse* within the meaning of the act. *Wright v. Williams*, 3 C., M. & R. 77 ; 1 Tyr. & Gr. 375, S. C. As to the construction of this statute with reference to what is "claiming as of right," and of the means whereby a claim may be still defeated, see *Bright v. Walker*, 1 C., M. & R. 211, 219 ; 4 Tyr. 502, S. C. *Bearley v. Clarke*, 3 Scott. 508, S. C. ; 2 *Hodges*, 100 ; 2 Bing. N. C. 705. See also *Monmouth Canal Co. v. Harford*, *ib.* 614, 631 ; 5 Tyr. 68, S. C. *Tickle v. Brown*, 6 Nev & Man. 230, 234 ; 4 A. & E. 369. As to forms of pleading under this act, see *Chitty on Plead.*, 7th ed. p. 226.

The lord of the manor may claim minerals against the Crown (*u*), a copyholder as against the lord of the manor (*v*), commoners may have the right to dig gravel (*w*), (but it seems not to take minerals to the exclusion of the lord (*x*)), the lord may have the right to take minerals against the copyholder, as well as the property in them, (but not in taking them to heap earth and refuse, and to burn cinders to an unlimited extent), either by Prescription or Custom (*y*). A custom, however, to take one sort of minerals is no evidence of a custom to take any other sort (*z*). The existence of a custom is a question for the jury, the validity of it for the Court (*a*). Courts of Equity will in some cases direct the Master to report and inquire concerning an alleged custom (*b*). A custom carries to the right to possession as well as property, evidenced as it must necessarily be by acts of possession.

(*u*) *R. v. Lord Yarborough*, 3 B. & C. 91; 5 Bing. 163.

(*v*) *Rowe v. Brenton*, 8 B. & C. 766; 3 Man. & Ry. 133; Gilb. Ten. 327. *Heydon v. Smith*, 13 Co. 68. *Hoskins v. Robins*, 1 Mod. 74. *Potter v. North*, 1 Ventr. 123; 2 Brownl. 319. *North v. Coe*, Vaugh 251; Co. Litt. 122, *a*; Godv. 173.

(*w*) *Duberley v. Page*, 2 T. R. 392. *Peppin v. Shakspear*, 6 T. R. 741.

(*x*) *Broadbent v. Wilkes*, Willes, 362; 1 Wils. 63; 2 Str. 1224.

(*y*) See Co. Litt. 122, *a*.

(*z*) *Curtis v. Daniel*, 10 East, 273. As to what is evidence of a custom generally, see *Reed v. Jackson*, 1 East, 357. *City of London v. Clerke*, Carth. 181; Bull. N. P. 233. *Biddulph v. Ather*, 2 Wils. 23. *Brown v. Rawlins*, 7 East, 429. *Hale de Jure Maris*, pp. 22, 30. *Freeman v. Phillips*, 4 Mau. & S. 486. *Nichols v. Parker*, 14 East, 331. *Weeks v. Sparke*, 1 Mau. & S. 679. *Somerset v. France*, 1 Stra. 154. *Irwin v. Simpson*, 7 Bro. P. C. 317. *Rowe v. Brenton*, *supra*.

(*a*) Black. Com 76. *Bastard v. Smith*, 1 Mood. & Rob. 129.

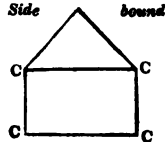
(*b*) *Edwards v. Fidel*, 3 Madd. 239.

The custom in Cornwall and Devonshire most materially affecting the right to mines is that of tin-bounding. This custom has from many causes become in modern times comparatively inoperative; as it has been recognised, however, by recent statutes and decisions (*c*), and is the title by which some property is held, and more may (it would seem) be still acquired, some space may not improperly be devoted to considering it. This custom, as far as it relates to Cornwall, is thus described in the most recent case which has come before the Courts concerning it (*d*), and was found to exist in fact by the jury, "that any person may enter on the waste land of another in Cornwall, and mark out by four corner boundaries a certain area (*e*); a written description of the plot of land so marked, with metes and bounds, and the name of the person for whose use the proceeding is taken is recorded in an immemorial local Court, called the Stannary Court, and proclaimed at three successive Courts, held at stated intervals: if no objection is successfully made by any other person, the Court awards a writ to the bailiff of the Court to deliver possession of the said "bounds or tin-work" to the boulder, who thereupon has the exclusive right to search for, dig and take to his own use all tin and tin

(*c*) 6 & 7 Vict. c. 106. *Post*, Appendix.

(*d*) *Rogers v. Brenton*, 10 Q. B. 26, and the cases cited, *infra*.

(*e*) Bounds ought to have four corners, consisting of twenty-four turf or stones, six to each corner. It may also have what are called side-bounds, which may be lost on non-renewal without loss of the corner-bounds. This is the diagram attached to convocation, 2 Jac. 2, article 2.



ore within the described limits, paying to the landowner a certain customary proportion of the ore raised, under the name of toll-tin. The right descends to executors, and may be preserved for an indefinite time, either by actually working and paying toll, or by annually renewing the four boundary marks on a day certain."

This custom is not altogether peculiar to Cornwall and Devonshire, but strongly resembles customs existing in Derbyshire, in the Forest of Dean (*g*), in France, and (it is believed) some other parts of Europe. The earliest evidence of such a custom is a Charter granted in the third year of King John to the tanners of Cornwall and Devon, which speaks of it as at that time ancient (*h*). It is repeatedly recognised and set out in subsequent charters and presentments of Stannaries Parliaments, and has been acted upon without interruption from the earliest times with which we are acquainted. For the antiquarian learning connected with this subject the reader is referred to Mr. Smirke's Report of the case of *Vice v. Thomas*, enriched by valuable notes, and an interesting collection of ancient documents. As the object, however, of this Treatise is merely practical, it is deemed sufficient to refer to some recent cases for the purpose of ascertaining to what extent the custom can be supported at present,

(*g*) See Hardy's Mining Customs of D. 1772. Doe d. Thompson v. Pearce, 2 Peake, N. P. C. 242. Gilbert v. Tomison, 4 D. & R. 222.

(*h*) Quod possint (stammatores nostri) omni tempore libere et quiete absque alicujus hominis vexatione fodere stammum, et turbas ad stammum fundendum abique in moris et in Feodis Episcoporum, et Abbatum et Comitum, *sicut solebant et consueverunt*, et emere buscam ad functuram stammi sine vasto in regardis forestarum, et divertere aquas ad operationem eorum in stammariis sicut de antiquâ consuetudine consueverunt.

and the legal incidents of it. The first case in which it was formally set out in pleading is that of *Crease v. Barrett* (i). In that case the landowner declared in trover (joined with a count on the case) for dues, in the shape of tin ore, against the defendant, who it was alleged in the declaration, had entered on the land of the plaintiff, and raised tin under the custom of bounding, which was set out, but had refused to pay the dues which by the particular custom of the place amounted to one-tenth (k). The principal question in the cause was the ownership of the freehold, upon which the jury found a verdict for the plaintiff with damages to the amount claimed. The effect of the verdict was merely to affirm, that it is part of the custom for a tinner claiming under it to pay a certain toll to the landowner, one of the points of difference between the Cornish custom and that of Devonshire, which will be subsequently spoken of.

The existence of this custom, in fact, and the interest it conferred came again before the Court in the case of *Doe dem. Earl of Falmouth v. Alderson* (l). In this case interlocutory judgment had been signed for want of a sufficient consent rule, (the form of the rule being to defend "for a certain tin-bound in the parish of, &c.") on the ground that ejectment would not lie for a tin-bound—leave having been given to amend

(i) 1 C., M. & R. 920.

(k) One-fifteenth is the ordinary amount. "The tinner paying out of such land so bounded, the usual toll only as generally paid within the Stannaries, that is, the fifteenth dish or quart, save in such places where the special custom has limited another rate of toll." Presentment of Parl. held at Lostwithiel, 11 Car. 1; *Pearse's Laws of the Stannaries*, p. 37.

(l) *Smirke*, p. 39.

by substituting "tin mine;" the cause was tried before Mr. Baron Alderson, at the summer assizes, 1836, for Launceston, when it appeared that the Earl of Falmouth was seised in fee of land, in which there was a tin mine; that the mine was within certain bounds, called *Beacon-bounds*, which had been duly renewed and kept on foot by the bound-owner, for a period extending as far back as living memory; that the mine had formerly been worked by the bound-owners; that in the course of the year 1834, between May and September, an unsuccessful attempt had been made by the defendant to discover ore, but that he had afterwards abandoned the mine, and removed the machinery and materials. In 1835, the lessor of the plaintiff granted a set to another party, who entered and worked the mine with success; whereupon the defendant forcibly expelled him, and took possession of the mine, and now set up the exclusive interest of the bound-owner, as a bar to the lessor of the plaintiff's right of possession. The defendant was not shewn to be the assignee of the bounds, but claimed under the bound-owner, without, however, satisfactorily proving any authority from him. The plaintiff's counsel made several objections at the trial, which were reserved for the Court above, but did not deny generally the existence of a custom of bounding. Both parties referred in proof of the nature of the custom, to the roll of the Stannary convocation 26 Geo. 2. The Judge left it to the jury to say, first, whether the bounds were immemorial bounds, in which case no proclamations were required; and, secondly, whether they had been transferred to the defendant, or to any one under whom he was entitled to work;

telling them that, if the defendant failed to establish either point, they should find for the plaintiff. The jury found a verdict for the plaintiff.

In Michaelmas term following, *Bompas*, Serjeant, obtained a rule nisi for a new trial, on the ground of misdirection, contending that the evidence of outstanding bounds was a defence, whether the defendant had any interest in them, or claimed under the owner of them, or not.

After the case had been twice argued, Parke, B. said, " My impression is, that the point has not been presented to the jury in a satisfactory way. The attention of the Judge was not drawn to it by the counsel. *Primâ facie*, the lessor of the plaintiff is entitled to the mines ; but the defendant undertakes to shew that his interest in them has passed to the bound-owner. Now the first question is, whether the interest of the bound-owner is such a possessory interest as would enable him to bring ejectment ; or whether he has a mere liberty to enter and get the mineral ? The next question is, whether such interest, if any, was in him at the date of the demise in the declaration ? The interest of the bound-owner depends on the custom, and ought to be found by a jury ; I pronounce no opinion upon it. With respect to the mode of acquiring and preserving the right, the Stannary Laws are tolerably clear. To obtain the right *de novo*, proclamations are indispensable ; but ancient bounds require none. To preserve the latter, it is necessary for the bounder or others in his behalf, either to renew annually, or, as it seems, to work within them, keeping up the visible marks of the old corners. If, by either of those modes of preserving the right, a possessory interest in the tin mines, was, on the 1st of

July, 1835, vested in a third person, it is an answer to this action, whether the defendant claims under him or not. This view does not seem to have been taken at the trial."

A difference of opinion existing in the Bench, the cause was sent down for trial a second time, and was heard before Mr. Justice Patteson, the substance of whose summing up to the jury is thus stated—"The first question is, whether, by the custom, the bound-owner has only an easement, that is, a right to enter and dig for tin, the possession of the soil and rest of the mine remaining in the lord; or whether he has such an interest and title in the mine, that he may for the purpose of getting tin, exclude the lord from the possession? It is difficult to see how this is to be put as a question of fact; but I am bound to do so; and if it should turn out to be, as I incline to think it is, rather a question of law, the Court above will know how to deal with it. No doubt, the boulder is entitled to nothing but the tin, and it is proved that tin and other metals are often found together; but there is no proof of any usage to grant concurrent sets of different metals to different adventurers, who are to work together. On the other hand, there is no reason, if such be the custom, why the mine should not be considered to be in the possession of the lord, subject to the right of another to search in it for tin.

"The next question is, as to the evidence of immemorial bounds. There is evidence of renewal on behalf of successive bound-owners for many years, and this will justify you in finding them to be immemorial, where no proof of their origin appears. In such a case proclamation and other formalities, if necessary, will be presumed. Whether the defendant has had a strict

legal conveyance of the bounds is immaterial, especially as there seems to be no doubt that a bound-owner may license another to enter and work without leave of the lord.

“Then as to the due preservation of the bounds by renewal, the only defect in the evidence, is in the years 1831, 1832, and 1834. The day of annual renewal was the 24th of August, unless that day was Sunday, and there was proof of regular renewal in 1833, 1835, and 1836. There was some slight evidence of renewal in 1834, and as the defendant had just before become the purchaser, and certainly did renew in the year before and after 1834, you will perhaps find without difficulty, as a very probable conclusion, that defendant did not omit to renew in that year. But there is no proof as to the two years 1831, 1832.

“Then it said that the Stannary custom, stated in 22 James 1, s. 18, cures the omission; for that if the keeper of the bounds, “carelessly lets slip his day of renewing, and afterwards renews before another tinner cuts a new pitch, such renewing shall be taken to be a good renewing against any other pitch;” and some parol evidence was given, that such an omission to renew is not forfeiture.

“Such a renewal may be enough to exclude another fresh pitch, but it does not follow that it will keep up the old one as against the lord. The omission to renew seems not to be a *forfeiture* in the proper sense of the word, but by it the bounds are lapsed and gone; the lord has the land free from bounds; and there is nothing in the evidence, or in the printed laws, to shew that he is excluded under such circumstances. Indeed, if renewal may be discontinued and then resumed at

any distance of time as against the lord, there is no reason for insisting as the custom does, on the punctual performance of the ceremony on every anniversary of the original pitch. It is true, that working alone may be sufficient to keep up the right, without strict renewal, provided the evidence of the limits is preserved; but there has been no working for several years before the action; only an unsuccessful attempt for a few months in one year."

The jury found,—1. That the bound-owner had not a mere easement, but a right to the mine.—2. That the bounds were immemorial.—3. That they had not been properly kept up.

Upon which Mr. Justice Patteson directed a verdict for the plaintiff.

In the following term Mr. Serjeant Bompas moved for a new trial, on the ground of misdirection, insisting that by sect. 18 of the Stannary Act 22 Jac. 1, the renewal of the bounds after a chasm in the years 1831, 1832, was enough to preserve them as well against the lord as other bounders; and that any other construction of the custom would make it inoperative, inasmuch as bounds were worth nothing, unless good against the landowner.

The Court however, said, The omission for two years was not shown to be mere negligence; it may have been a voluntary abandonment. The jury have found, not merely that the bounds had not been renewed yearly, but that they had not been "kept up" according to custom.

On a subsequent day the Court refused a rule *nisi* on the above point.

It will be observed, that at the first trial, no question was submitted to the jury as to the *nature of the custom of bounding*, nor as to the *renewal* of the bounds; their opinion being taken only as to whether the particular bounds were immemorial, and whether they had been transferred to the defendant. The learned Judge seems to have taken for granted the view previously expressed by the Court, in the discussion of the consent rule, viz. : that the owner of the bounds had not an exclusive possessory right to the unsevered minerals, for if he had, the latter question could not have arisen.

It is difficult to see how the cause could have been tried satisfactorily, without some question being submitted to the jury as to the nature of the custom; on the other hand the difficulty which occurred to Mr. J. *Patteson* is equally evident, of leaving to the jury to ascertain what the custom was in fact, without leaving to them conclusions of law. It is clear that the jury could not be asked whether the tin-bounder had such an interest as would support ejectment, yet this question is not very different from "whether, by custom, the bound-owner has only an easement (*m*), that is, a right to enter and dig for tin, the possession of the soil and the rest of the mine remaining in the lord: or, whether he has such an interest and title in the mine, that he may, for the purpose of getting tin, exclude the lord from the possession?" Whether or not the case was in the second trial properly submitted to the jury, and whether their verdict relative to the right of the bound-owner would have been considered conclusive,

(*m*) This expression is probably not quite accurately reported, for the right "to enter and dig for tin," is at the least more than an easement, and cannot be put lower than a *profit à prendre*.

or only as furnishing facts to which the Court might apply the law, it became unnecessary to decide, inasmuch as the jury found that the particular bounds in question had ceased to exist. This case decides nothing, but that a jury are warranted on such evidence as was then offered, (and what the evidence was can only be collected from the summing up of Mr. J. *Patteson*), in inferring that bounds have not been properly renewed. It is not uninstrusive, however, giving rise as it did to expressions of opinion on the subject by two very learned Judges.

The next case to be referred to is that of *Vice v. Thomas*, decided on appeal to the Lord Warden (*n*) of the Stannaries. One Enys being lawfully possessed of some tin-bounds, demised them for twenty-one years to Thomas (the plaintiff below), who entered and worked for tin, erected buildings and machinery, expending about 10,000*l.*, and continued working for about four years, during which he raised large quantities of ore, when he gave up actual possession, leaving the erections and machinery standing, with the intention (as alleged in his petition) of resuming the works, and duly renewed the bounds at the proper times. About seven years after, the defendant entered and worked the mines. The plaintiff presented his petition to the equity side of the Vice Warden's Court, setting out these facts, and praying for a decree that the possession of the tin-bounds should be delivered up to him, and for an account of the profits.

To this petition the defendants demurred, on the grounds (amongst others) (*o*), that the petition was an

(*n*) Reported by Mr. Smirke.

(*o*) It is thought necessary only to mention those upon which the decision of the superior Court turned.

indirect attempt to try the title to mines in a Court of Equity ; that it was on the face of it a plea of land, and a proceeding in the nature of ejectment ; that the first part of the prayer was substantially for a writ of *habere facias possessionem*, and the second an application for the mesne profits ; that for any cause or complaint set forth, the remedy was in a Court of law, and that no case had been made out for equitable relief ; the Vice Warden having overruled the demurrer, the case was argued on appeal before the Lord Warden (Prince Albert), Lord *Lyndhurst* (the Lord Chancellor), Lord *Brougham*, Lord *Langdale* (Master of the Rolls), *Wigram* (Vice Chancellor), and *Parke* Baron, whereupon the following judgment was pronounced by the Lord Warden.

“ This case comes before me by way of appeal from an order of the Vice Warden of the Stannaries Court of Cornwall, overruling a demurrer filed by the appellants to a petition of the respondent. This petition was entitled on the equity side of the Court, and was in the nature of a bill in equity. The case was argued, upon the appeal, on the 21st of the present month. The Judges, with whom I have advised, have communicated to me their opinion, and the judgment which I am about to pronounce, is in conformity with that opinion.

“ The petition stated that under an indenture, dated the 12th of August, 1835, the respondent, as lessee of John Samuel Enys, became entitled for a term of twenty-one years, commencing on the 11th of December, 1823, to certain tin-bounds, with liberty and authority to dig, work, and search for tin and tin ore, within, under, and throughout the said bounds,—that

in pursuance and exercise of such liberties and authorities, the respondent worked the mines within the prescribed bounds, and expended 10,000*l.*, or thereabouts, in erecting the machinery and buildings necessary for working the mine, and in digging, working, and searching for tin and tin ore.

“ That respondent continued to dig, work, and search for tin and tin ore within and under the same tin-bounds, until about the month of May, 1827, when he discontinued working, but with the intention of resuming mining operations, and prosecuting and effectually working, within and under the said tin-bounds ; and that with that view and intent he left whims and other machinery standing upon and within the bounds, when he discontinued working the mine.

“ The petition then alleged the due performance by the respondent of the duties and obligations imposed upon him by his lease, and alleged that the lease, and the liberties, licences, powers, and authorities thereby granted were respectively valid, and subsisting for the residue of the term of twenty-one years, and that the tin-bounds granted by the indenture were good and lawful tin-bounds, and had been duly and regularly preserved and kept on foot as required by and agreeably to the laws and customs of the Stannaries of Cornwall.

“ The petition then stated that, in or about the month of January, 1834, the appellants forcibly and fraudulently entered upon the respondent's tin-bounds, and broke down and removed his machinery, and expelled and dispossessed him from and out of the same, and that the appellants had thence hitherto kept and did still keep possession of the mines, and had raised

and obtained tin, and tin ores, within and under the respondent's bounds, and had carried away and converted and disposed of, to the appellant's own use and benefit, divers large quantities of tin and tin ore of great value, to the injury of the respondent, and against the laws and customs of the Stannaries.

" The petition then,—after stating that the respondent had required the appellants to deliver up to him the possession of the tin-bounds and workings within the same, and the tin and tin ore raised therefrom, then being in the possession of the appellants, and to account for, and pay to him the proceeds and produce of the tin and tin ore which the appellants had carried away and converted to their own use, and that the appellants had refused and still refused so to do—prayed, in effect, that the appellants might answer the petition, and might be ordered to give up to the respondent the possession of the mines ; to deliver to him all tin and tin ore then in their possession ; and account for the value of all tin and tin ore which they had converted to their own use.

" To this petition the appellants put in a demurrer, in which were assigned divers causes of demurrer, including the following : ' That the respondent had not, by his petition, made or shewn such a case as entitled him in the Vice Warden's Court to any account, discovery, payment, or relief, as in the prayer of the petition mentioned, from or against the appellants or either of them, touching the matters alleged in the petition, or any of such matters, and that the petition contained no matters of equity whatsoever, nor any statement, complaint, matter, or thing, which could entitle the respondent by law to the interference or

assistance of a Court of Equity against the appellants or either of them.'

"The demurrer came on to be argued before the Vice Warden on 24th January, 1838; and 21st of April, 1838, judgment was delivered, overruling the demurrer, and ordering the appellants to answer the bill; and it is from this judgment that the present appeal has been brought.

"The particular ground of demurrer, which has been referred to, does not challenge the jurisdiction of the Vice Warden to decide questions proper for the decision of a Court of Equity; but admitting that jurisdiction for the purposes of the argument, it insists that the matter of complaint in this petition is not proper for the decision of any Court of Equity.

"Assuming for the purpose of trying this question, that the petitioner might have recovered the possession of the property in ejectment, and this the jurisdiction of the Vice Warden on the equity side of the Stannaries Court does not differ from that which is exercised in the High Court of Chancery, if the petition had prayed that possession might be delivered to him, and nothing more, it is clear that the demurrer must have been allowed. For the question upon which the right to possession in this case depends is purely a legal question, and no impediment is suggested in the petition, the necessity of removing which would entitle the petitioner to transfer his complaint from a Court of law and bring it into a Court of Equity.

So, if the plaintiff, in addition to a prayer that possession might be given him, had prayed that the defendant might account for the mesne profits since he took possession of the mines, and these profits had been

of the ordinary character of rents of real estate, the demurrer must have been allowed ; for there is nothing in such an account which requires the extraordinary powers of a Court of Equity to take it.

“ The question then remains, whether or not the circumstance that the mesne profits, of which an account is sought, are the profits of a mine, alters the case ? The petitioner does not state even in the most general terms that any difficulty would exist in taking the account, nor that the account cannot be taken except in a Court of Equity, nor does he suggest a single fact from which the Court can infer that a reason exists why the account of mesne profits may not be taken as conveniently in a Court of law as in equity, unless it is to be inferred that such is the case from the mere fact that the profits, of which an account is sought, are the profits of a mine.

“ I am of opinion that I cannot judicially draw such an inference in the absence of circumstances leading to it, and in a case between parties wholly adverse to each other. Such an inference could not be drawn unless it were admitted that in no conceivable case can an account of mine profits be taken without having recourse to a Court of Equity.

“ The next question then to be considered is, whether it is right to assume that possession of the mine might have been recovered in ejectment ? The Vice Warden in deciding this case did not express any doubt that possession of the mine might be recovered in ejectment, his proposition was merely this, that a Court of Equity had concurrent jurisdiction with a Court of law. The cases cited at the Bar during the argument shew that ejectment will lie for a mine in circumstances like

those of the present case ; and I consider that such is the law of the case.

“Then has a Court of Equity a concurrent jurisdiction with a Court of law in the absence of all special circumstances to give it such jurisdiction ?

“The Vice Warden was of opinion, that such a concurrent jurisdiction existed. In support of this opinion which is clearly at variance with the first principles of equity as administered in the High Court of Chancery, the Vice Warden relied upon certain precedents in the Stannary Court which were brought under his notice ; and if these precedents had been so numerous as to lead irresistibly to the conclusion that the jurisdiction of that Court over such questions was clearly established ; or if it had appeared that, in those precedents the decision of the Court had been come to after solemn argument, the question might have been entitled to a different consideration from that which I feel bound to apply to it. But this is not the case, and in the absence of the most conclusive evidence in support of an equitable jurisdiction so anomalous as that contended for, I am compelled to hold that no such jurisdiction exists.

“In the judgment which has been delivered I have relied upon the circumstance that no difficulty is suggested in the petition in the way of taking the accounts, which the petitioner asks. Admitting, as a general proposition, that where any part of the relief which a party claims is proper for the decision of a Court of Equity, that court will incidentally decide all questions of law which may be ancillary to the equitable relief, there is strong authority for holding that, in the particular case of a party out of possession of an estate,

claiming equitable relief, the right to which depends upon the right of possession, the Court requires that the party so circumstanced should recover the possession at law before he files his bill for the consequential equitable relief. The decision of the Vice Warden must therefore be reversed.

“It may be proper to add, that although it has been unnecessary, for the purposes of this appeal, to advert to the question of the equity jurisdiction of the Vice Warden of the Stannaries, I entertain no doubt whatever of its existence.”

The legal point (*o*) decided in this case may be thus shortly stated, “that the owner of a tin-bound, who has worked within his bounds and has quitted them with the intention of returning, may, after a lapse of seven years (the bounds having been annually renewed) by proceedings at common law, recover possession of them against a person who has entered without title.” What his remedy would have been, or whether he would have had any, if he had *abandoned* possession of the works, still formally renewing the bounds, was left to conjecture, and came before the Court of Queen’s Bench in the case of *Rogers v. Brenton* (*p*).

The plaintiff there declared that he was lawfully possessed of and entitled to, and ought to have had and enjoyed the tenement following: that is to say, “the right and liberty to dig, get, raise and carry away, for his own use, the tin and tin ore found and being within a piece of ground called the Ruby Tin-Bounds, in the parish of Wendron, in the county of Cornwall: yet the

(*o*) The equitable point may be stated as shortly, *viz.*, that the principles which govern the High Court of Chancery are applicable to the Vice Warden’s Court, notwithstanding some vicious precedents.

(*p*) 10 Q. B. 26.

defendant, well knowing the premises, but contriving, &c., wrongfully dug, got, raised and carried away large quantities of the tin and tin ore found within the said piece of ground: whereby the plaintiff was deprived of the benefit which he might and otherwise would have derived from his said right or liberty, and the said tenement thereby became of less value to the plaintiff than it otherwise would have been." There was a second count in trover for tin and tin ore.

The defendant pleaded 1st, not guilty; 2ndly, the 1st count, denying that the plaintiff was lawfully possessed of or entitled to the tenement.

The plaintiff claimed as "bounder" or "owner of a pair of bounds," by force of the custom of Cornwall, to which he derived title as executor and legatee of his father. The tin-bounds had not been cut or pitched within living memory: nor was there any evidence of their commencement, but proof was given of the annual renewal of them for seventy years past. Tin had been raised in small quantities under the bound-owners, and customary toll paid to the lord at various periods, about sixty, fifty, forty-four, and forty years before the commencement of the action. The defendant was the agent and captain of a company of adventurers, who had been working for several years within or near the Ruby bounds, but had only raised tin ore shortly before the action. They refused to pay any dues to the plaintiff, or to recognise his title as bound owner. The defendant claimed under a settlement from a lessee of the Duchy, but of this there was no strict evidence. The roll of the Stannary Conventions or Parliament, held 22 Jac. 1; 1 Car. 1; 12 Car. 1; 2 Jac. 2, and 26 Geo. 2, which last recited

the acts of the previous convocations was put in. The entries read were Articles 17 and 18 of 22 Jac. 1 ; Articles 3, 4, and 31 of 12 Car. 1 ; Articles 2 and 4 of 2 Jac. 2, and part of Article 8, s. 1, of 26 Geo. 2 (*q*). These were put in as declarations of the custom (*r*).

(*q*) From printed edition, 1824.

(*r*) Art. 31 of Car. 2, c. 1, item 8, and Art. 8, ss. 3, 4, Conv. 26 Geo. 2, which much limit the custom, were as follows :

"We agree, constitute, and ordain," (the other articles beginning "We present and affirm") that if any tin works under bounds hath lien, and shall lie, unwrought for the space of seven years, and any tinner shall be desirous to work the same, he shall signify such his purpose to the owners of the said work, or to most of them, and shall cause to be entered of record upon the Court-book, the place where the said work lieth and the time of such his declaration, to whom and before whom : and then if the owner of the said works or some of them, shall not work, set, or procure the said work to be wrought within one year next after the declaration made unto them, if the owners have not any other work than in working by their own adventure, it *shall be lawful* for the said person that gave such warning to the owners to work the said work at farm as long as he will continue his costs therein, paying to the owner, if it be a dry work, the seventh dish to farm, and if it be a water work that draweth water, both summer and winter, but the ninth dish to farm, provided that before he enter into the work he shall give sufficient caution, such as the steward of the Stannaries Court shall allow for the well and orderly working and preservation of the said work, &c.

By Convocation 26 Geo. 2, art. 8, s. 3, it is "declared and enacted," that if the bounds lie unwrought for twelve months, any tinner may work them after giving notice to the owners and bounders, and entering of record in the Stannaries Court a declaration on oath of having done so.

By sect. 4 it is "declared and enacted, that *all bounds hereafter cut shall be void*," unless three months' notice be given to the landowner.

These articles were objected to by the defendants, as containing new enactments, instead of mere declarations of custom. The last obviously is so. A new trial would have been granted had it been necessary, on the ground that the learned Judge left them to the jury without sufficient direction to distinguish between the enacting and declaratory effect of the articles. It is difficult to see what direction this could have been, but that the enacting parts were no evidence of the custom—as to what amounted to an enactment and what a declaration, this must have been for the Judge. These articles were excluded from consideration in the judgment, and

The commissions under which the convocations 2 Jac. 2, and 26 Geo. 2, were held, were also proved, none earlier being found (*s*). They shewed that the convocation professed to make new laws, as well as presented old customs. A charter of 23 Hen. 7, was put in, which, among other things, recognised bounders (bundatores) as being possessed of tin works (opera-stanni), and their obligation to enter the description of newly bounded works in the Stannary Court (*t*). Certain extracts from the Court Rolls of the Stewards of the four Stannaries in the reigns of Hen. 6, Hen. 7, Eliz. and Jac. 1, were read, to shew the early existence of tin-hounds, or "opera stannaria," proclamations of them in the Stannary Court, and presentments of the custom generally. Ministers' accounts rendered to the Crown by officers of the Duchy in 25 & 29 Edw. 1; 28 Edw. 3; 7 & 8 Hen. 7; 21 & 22 Hen. 7; 22 & 23 Hen. 7; were produced, to shew the receipt by the lord of the manor of "toll tin," from tin works; the toll tin being explained to mean the customary dues payable to the freeholder out of the bounded tin mines. Leases by the Crown and Duchy of "toll tin" belonging to the Duchy, and also of "tin mines" in enclosed land, were read from the Appendix to Concanen's Report of *Rowe v. Brenton*, p. 205 (*u*). The Assession Roll, 2 Ric. 2, and the answer of tenants to interrogatories, at an assession Court, held for the manor of Helston in

cannot (it would seem) be considered as any evidence of the custom.

(*s*) The last commission is printed in the Appendix (F), to *Rowe v. Brenton*, 3 Man. & Ry. 497.

(*t*) Printed in the Appendix to *Vice v. Thomas*; the original is in the patent roll.

(*u*) Edition, London, 1830, some not there found were produced from the Public Records.

Kerrier, in 1619, were produced to shew the existence of bounded tin mines, rendering toll to the lord of that manor. Parol evidence was also given by mine agents, solicitors, land agents, and old tollers, *i. e.* persons employed to renew bounds and collect tolls, who spoke of the general prevalence of the custom in different parts of Cornwall, the large receipts of dues by owners of tin-bounds, and the extent to which they were made the subject of sale, devise and settlement. The customary amount of toll, *viz.*, one-fifteenth, was sometimes waived by agreement. They all agreed that after being legally set on foot, the bounds could be preserved by mere annual renewal of the turfs or bounds at the corners: and they did not speak of the bounds as consisting of any particular number of turfs. Some of the witnesses doubted whether even this ceremony was strictly necessary, except as evidence of the right. They also differed as to the consequence of neglecting to renew on the exact day. None could assign any limit to the surface of land that might be included in the four corners: but it was said to be generally of very small dimensions. One of the most experienced witnesses remembered a pair of tin-bounds, "a quarter of a mile each way," but this was the largest he knew of. Only one instance of newly proclaimed bounds was recollected by any witness; all the wastes of tin mining districts being supposed to be already under ancient bounds;—no evidence was given on the part of the defendant.

Wightman, J., (before whom the case was tried), told the jury that the reasonableness of the custom could be considered by them only as an element in

forming their opinion, whether it existed in fact : that if working was essential to the custom, they should find for the defendant ; but if the custom was, that bounds duly proclaimed and renewed gave an exclusive right to the tin, then they should find for the plaintiff. The jury (*v*) found a verdict for the plaintiff.

On the argument of a rule to enter a nonsuit (in pursuance of leave) ; it was contended (among other things), in behalf of the defendant, that the custom alleged was void in law. 1st, because a right to take a profit in the land of another cannot be claimed by custom (though it may be by prescription) ; 2ndly, because the custom was unreasonable (*w*). The Court decided that the custom was not bad on the first ground, because the right of bounding, which from its nature cannot be prescribed for, not being attached to any person, or permanent body, must necessarily be claimable by custom ; on the 2nd point, they decided that the custom as set out in the declaration, and found to exist by the jury, was unreasonable, in as far as it conferred a right to bounds in a person not actually working. Although the points decided may be thus

(*v*) A Middlesex jury, the venue having been changed from Cornwall by a Judge's order.

(*w*) On the part of the plaintiff an attempt was made to place the right of tin-bounding even on a higher footing than custom, by establishing it to have been part of the common law of Cornwall at a time when Cornwall was an independent kingdom, and when similar laws prevailed throughout the continental states, this attempt however was unsuccessful. See the very learned argument of Mr. Smirke ; had the position been established however, it would not seem to have carried the plaintiff's case further—for a custom is *lex loci*, and if shewn to have existed before legal memory, it does not seem material to inquire how much before. See 7 Vin. Abr. 187, tit. Customs (H), pl. 10. Year Book, Mich. 35 Hen. 6, fol. 27. 28, a. Le Case de Tanistry, Davey, 28, b.

shortly stated, several extracts from the elaborate judgment pronounced will throw light upon the general bearings of the subject.

“ Upon this ownership (of the land, giving a *prima facie* title to minerals), the custom of bounding has been engrafted; and up to the extent to which both sides are agreed to admit it in fact, there can be no doubt that it is most reasonable, fulfilling every requisite of a good custom. In substance it is this; the mine is parcel of the soil; the ownership is in the owner of the soil, but it is a parcel which to discover and bring to the surface may ordinarily require capital, skill, enterprise and combination; which, while in the bowels of the earth, is wholly useless to the owner as well as to the public; and the bringing of which into the market is eminently for the benefit of the public. If therefore the owner of the soil cannot, or will not do this for himself, he shall not be allowed to lock it up from the public; and therefore in such case (unless by enclosure, he may seem to have devoted the land to other important purposes inconsistent with mining operations, such as agriculture, or building), any tinner, *i. e.* any man employing himself in tin mining, may secure to himself the right to dig the mines under the land, rendering a certain portion of the produce to the owner of the soil.

“ It is right to observe, in passing, how every step, even in this strong invasion of the rights of ownership, still is made with reference to them. In the first place, the land to be bounded (we speak of a supposed original case of bounding) must be wastrel; if it be several and enclosed, it must have been anciently bounded while wastrel, and so, in the language of the

country, assured for wastrel: the liability must have first attached on it, therefore, before inclosure and devotion to other useful purposes. Then after the tinner or bounder has commenced by cutting the turves, and so marking out the limits within which he will work, proceedings are to be taken in the Stannary Courts, of which the owner has notice; and sufficient time is allowed before the bounder's title becomes complete, during which the owner may still intervene, and preserve his rights entire, so as he will exercise them for the benefit of the public. If he abstain from any interference, it may well be considered that he has consented to the bounder's proceedings; and the customary render of the portion called toll tin, may be a very sufficient consideration to him for what he gives up of his original exclusive rights."

After discussing the legal character generally of the bounder's title, and explaining *Vice v. Thomas* to have been decided on the ground that the bound-owner was there in constructive possession, and therefore in accordance with *Doe d. Hanley v. Wood*, where it was intimated that a mere license to dig, coupled with possession of a mine, would confer an interest sufficient to sustain ejectment, and distinguishing the case of *Doe d. Earl Falmouth v. Alderson* from the present, on the ground that that case turned solely upon the effect of evidence, and the opinion of the jury, whereas in the present, the question was limited by the terms of the declaration in which the plaintiff had described his interest as an incorporeal tenement (and the Court seemed to think rightly): Lord Denman proceeds:—

"This then brings us to the point which was more

especially contested on the argument, whether this customary right can exist without continuing *bonâ fide* to search for tin, and to work the land for mining purposes within the enclosed limits ; whether it is sufficient merely to renew the bounds annually by a new cutting of the turves as at the commencement.

“ Assuming for the present the validity of the custom, if the *bonâ fide* working within the bounds be made a part of it, and assuming that it is a custom which is to be tried by the tests established by the common law for ascertaining whether a custom be good or not, it appears to us that without this qualification it cannot be sustained. Customs, especially where they derogate from the general rights of property, must be construed strictly ; and above all things they must be reasonable. Bounding is a direct interference with the common law rights of property ; it takes from the owner of the land, who is unable or unwilling at a particular moment to dig for tin under his waste land, the right to do so, it may be for ever, and vests it in a stranger, making only a customary render in return : it empowers the stranger not only to extract the mineral from beneath the surface, but to enter on the surface and cumber it with machinery, buildings and refuse stuff which the operations below occasion, and all this without the least regard to the convenience or interests of the owner.

“ The *only things* which make this reasonable are the render of the toll tin to the owner, and the benefit to the public secured thereby in the extraction of the mineral from the bowels of the earth. Both these are not only lost, but the latter, it may be, positively prevented, if the bounder may decline to work and yet

retain the right to exclude the owner. Instead of insuring that the minerals should be brought to the surface, the custom so construed may be made the means of keeping them locked up within it, and at the same time preventing any improvement in the surface. Many bounds may become the property of the same owners, who may think their interests best served by limiting the supply and diminishing competition, while the owner will decline to spend his capital in building or agricultural improvements, because at any moment the bounder may renew his operations, and entirely and without compensation defeat the purposes of his expenditure.

“If it be said that the public good is best served by that regulated supply which best serves the private interests of the bounder, that wherever it is for the interest of the public that the mine should be worked, the interest of the bounder will be to meet the demand by an adequate supply, and that when the mine is not worked it is only because it is for the interest equally of both that it should not be; without admitting or denying the truth of these assertions, one answer is that, where such a state of things has existed so long and so decidedly as to amount to reasonable proof that the original purpose with which the bounds were enclosed has been abandoned, it is unreasonable to maintain the bounds themselves. It may have been that the owner did not enclose the land, or work for the mineral himself, only on account of a temporary inability, or the temporary existence of the same causes which the bounder now alleges as the ground for his ceasing to work. Why then is he to lose his earlier and better right for ever, and under the same circum-

stances the boulder to preserve his? Another answer is drawn from regarding the original purpose of the custom, which was not founded on the doctrine of demand and supply, but on the expediency simply of bringing the mineral to the surface for the use of men. Another, if another be needed, is that the render of a portion of the mineral to the owner of the land is part of the consideration on which the boulder's right was originally founded; it is part of the compact, without which it may be that the landowner would never have consented to the bounds; and it is of course quite independent of such considerations as that of working profitably to the miner. The condition that the bounds shall be annually renewed by new cutting the turves is useful for keeping the limits well ascertained, and also for preserving the evidence of ownership; but it is no substitute for the working itself, considered as the ground on which the reasonableness of the custom rests.

“When the evidence in this case is referred to, the variations and uncertainty in which those are involved who contend that the bound-owner need not work, strongly favour the conclusion in law at which we have arrived. The jury, indeed, have drawn a conclusion of fact from the whole, which, as such, we should not feel disposed to disturb; for it was their province to draw it from the statements submitted to them. But, on reading the report, and finding among other things that there is a conflict among the witnesses, who from professional habits might have been supposed best able to speak to the point, whether even an annual renewal of the bounds be necessary to preserve the ownership in the bounds, and also that much reliance seems to have been placed on the fact, entirely inconclusive,

that owners of land have in many instances not proceeded as for forfeiture of the bounds where the mines have not been worked, we see every reason to believe that the unqualified right now claimed is but an abuse of the original limits of the custom, inconsistent with its object, and not to be sustained on any principle."

A learned note is appended to this case by Mr. Smirke, in which he adduces many sound reasons and authorities for supporting the conjecture of the Court, "that the unqualified right now claimed is but an abuse of the original limits of the custom" (*x*). He also adduces reasons against the validity of the custom even with the restrictions imposed upon it, of considerable weight, but which do not appear conclusive. These are—

1st. That the evidence of the custom, documentary

(*x*) Among these are, that the ancient charters are granted to tinnors "*operantes in stannariis*," and "*dum operantur in eisdem*." That in a register of the Black Prince, preserved among the Public Records, there is a writ 25th Edw. 3, reciting that tinnors claiming any interest in tin works, and refusing to work or contribute to the working, forfeit their share by the ancient usages, ("*solonc les auxiens usages*,") and the proper officer of the Duchy is commanded to enforce compliance with the custom—that in the Stannary Court Roll, 4 Rich. 2, there is an entry of a plea of trespass to a tin work, to which is pleaded, "*quod dictum opus Stann', fuit vacans die quo supponitur, &c., et per unum quart anni ante, et petunt unde judicium. Et quærens dicit quod non fuit vacans die,*" &c.—that in another Court Roll of 21 Hen. 6. (Chagford Stannary), there is a plea to a plaint of trespass that the work was "*opus alay*," *i. e.* deserted and left, and defendant entered under the Stannary custom—that the Devonshire Stannary Parliament, held 10 Hen. 7, and ratified by Prince Arthur, declared that "no persone, neyther persones, having possession of lands and tenements above the yerely value of 10*l.* nor noone other to their use be owners of eny tynwork or parcell of eny tynworke," with the exception of persons "claiming by inheritance or possessed of tin work on their own freehold"—thus contemplating working tinnors only—that Carew says (Survey of Cornwall, f. 136, ed. 1769. "These bounds he (the bounder) is bound to renew once everie yeere, as also in most places to bestow some time in working the myne, otherwise he loseth his privilege."

and parol, prescribes no limits to the area capable of being bounded, and he refers to an attempt made to bound the whole of Dartmoor.

2ndly. That the extent of working necessary to secure the title of the bound-owner is not ascertained.

3rdly. That the right of the bounder is of no value without the use of running water, a privilege anciently attached to it, and still supposed to be so, but which, however, he appears to think cannot be supported, citing *Bastard v. Smith* (y).

4thly. That the custom asserts a right not only to "take," but to "search for" tin (z); and that "whether the search is to be justified only by the successful result of it, or the claimant is to dig at will for an unlimited time over a bounded area in the mere chance of success, is a matter on which the custom and its interpreters are silent."

5thly. That the custom nowhere provides for the occurrence of veins of mixed metals, being adapted only to stream works, and that the bounder must claim a right to deal with, and, if need be, destroy the property of another, or must work at the peril of becoming a voluntary wrongdoer by detaching from the vein a metal which does not belong to him, and was not the object of his search.

6thly. That in the case of tin bounds in copyhold land, the dues are payable to the lord of the manor, and not to the copyholder who is the only person injured.

As these objections, if valid, would do away with the custom altogether, and all rights and property

(y) 2 Moo. & Rob. 129.

(z) 3 Man. & Ry. 497, 498, note.

arising out of it, it may be worth while briefly to consider the force of each of them (*a*).

With respect to the first, if the custom were, in fact, to bound *any* area, such as Dartmoor, it must be conceded that it would be unreasonable; the evidence in every case, however, has confined the area boundable to narrow limits, though the exact amount of them has not been settled; if it be so limited, there will be in each case a question for the jury, whether the bounds be or be not within the ordinary extent of bounds according to the custom. It should be remembered too, that the custom gives the landowner an opportunity of objecting to the too great extent of bounds (among other things) in the Stannaries Court before they are established.

If the area boundable be small, the difficulty suggested by the 2nd objection diminishes, and amounts to no more than that of ascertaining what is a reasonable and *bonâ fide* working of mines or quarries within a demised piece of land, subject to forfeiture for non-working; a question which has been submitted to juries (*b*), and is not necessarily more difficult of solution than many others which are frequently determined by them; such, for example, as that of reasonable diligence, farming according to the custom of the country, keeping premises in good and tenantable repair and the like.

The third objection affects only the usefulness of the

(*a*) These points were, it is believed, raised by Mr. Smirke, rather with a view of suggesting matters for consideration, than of expressing a decided opinion against the validity of the custom.

(*b*) See *Doe d. Bryan v. Bancks*, 4 B. & Ald. 401. *Doe d. Boscawen v. Bliss*, 4 Taunt. 735. *Doe d. Tarrant v. Hellier*, 3 T. R. 170. *Hanson v. Boothman*, 13 East, 22. *Jones v. Shears*, 7 C. & P. 346.

custom to the bound-owner, not the validity of it, and opens up a new field of inquiry into a custom, as it were, appurtenant to that of tin-bounding, respecting which there are no positive decisions (as far as the writer is aware), and which may very possibly come before the Courts.

This privilege is recognised in the charters of John and Edward 1st, where the tinner's are expressly authorized "*divertere aquas sicut consueverunt*," and by the Roll of the Stannary Parliaments; it is also frequently noticed in the Stannary Court Rolls, and has, it is believed, been extensively practised both in Devonshire and Cornwall, principally in the latter.

The marginal note, indeed, of the case of *Bastard v. Smith* (referred to by Mr. Smirke) contains this statement, "The stannars of Devonshire are not entitled, by custom, to divert water from streams into their mines, and for that purpose to dig trenches over other people's lands." No such question, however, was decided as matter of law, and the case only amounts to this, that the jury found no such custom(c) to be

(c) The custom contended for was thus set out: "Within and throughout the county of Devon there now is, and at the said several times when, &c., was, and from time whereof the memory of man runneth not to the contrary, there had been a certain antient and laudable custom used and approved of, *viz.*, that every stannar, or working tinner, working any stannary or tin mine in the Stannaries in the said county, hath and have had, and hath and hath been accustomed to have, without interruption, and of right ought to have had, and still ought to have free liberty to divert and convey water from any watercourse, or stream of water in the said county, unto and into any stannary or tin mine in the Stannaries of the said county, whilst being worked by such stannar or working tinner, and unto and into the works of the same, so often as and so long as the said stannary or tin mine, or the works thereof, were being worked, and where, when, and so often as need or occasion should be or require the same, and in such quantities as were or may be convenient or necessary for the better, or more convenient

proved by the evidence then adduced; the documentary evidence adduced is stated at some length, and seems to have consisted of part of that produced in *Rowe v. Brenton*, *Rogers v. Brenton*, and the other great mining cases. It is not stated, however, what evidence was given of acts done in pursuance of the custom, or of reputation on the subject. It is possible that on further evidence of this latter description the same jury might have found such a custom to exist. It is probable, too, that in Cornwall much stronger evidence of the prevalence of this custom could be adduced than in Devonshire. The learned Chief Justice of the Common Pleas, who tried the cause, expressed no opinion as to the validity of the custom in point of law, (a question which would, doubtless, have come before the Court if the jury had found it to exist in fact,) but intimated that it was one so far interfering with the rights of private property, as to require strong evidence

operations and working of such stannary or tin mine, and the works thereof, and for the washing and cleansing of the tin, being in, and coming and arising therefrom, and to dig, cut, sink and make, and keep, continue, and maintain in, upon, and through any land or lands, in the said county situate, such trench or trenches as from time to time were convenient and necessary for the diverting and conveying of the said water from such watercourse, or stream of water, as aforesaid, in and along such trenches, unto and into such stannary or tin mine whilst being so worked, and unto and into the works thereof, so often and so long as the said stannary, or tin mine, or the works thereof were being worked, when, where, and so often as need or occasion should be, or require the same, for the better more conveniently operating and working of such stannary or tin mine, or the mines thereof; and for washing and cleansing of the tin, being in and coming, and arising therefrom, and to do all such works or things in and upon the land or lands, in, upon, and through which such trench or trenches were to be, or were so dug, sunk, or made, for the purposes aforesaid, as were or might be necessary for the digging, cutting, sinking, or making of such trench, and keeping, and continuing, and maintaining the same for the purposes aforesaid."

to establish its existence. He said to the jury, "although you are not called upon to say whether this is a reasonable custom or not (for that is a matter of law not submitted by the present pleadings to your decision) still you may properly thus far look to the nature of the custom, that if you find it greatly affecting the rights of private property, you may fairly expect and require that it should be supported by evidence proportionably strong and convincing. You are not to come to the conclusion that the inhabitants of a large district, like that over which the supposed custom extends, surrendered their rights over their own soil, unless you find repeated acts of exercise of the custom on the one hand and of acquiescence on the other. You cannot, indeed, reasonably expect to have it proved before you that such a custom did in fact exist before the time of legal memory, that is, before the reign of Richard 1 ; for, if you did, it would, in effect, destroy the validity of almost all customs : but you are to require proof, as far back as living memory goes, of a continuous peaceable and uninterrupted use of the custom ; and then you should inquire whether any document, or memorial, of more ancient times, is produced, tending to *disprove* the existence of the custom at that early period to which the law looks back." It is difficult to say that the custom of diverting water interferes more with private property than that of tin-bounding, or is, in other respects, more unreasonable, unless it be that no compensation is paid to the land-owner for the water *eo nomine*, although, if it contribute to the raising of tin, it is indirectly paid for by the tribute. It should be observed in this case, that the custom, as set out, was of the largest description,

viz., to make trenches upon any land in the county, and the trenches made were through the lawn, garden, woods, and plantation of the plaintiff, and trees were cut down. It remains to be seen whether a more limited assertion of the custom (c) would meet with a favorable consideration from the judge and jury. At present the existence of such a custom in fact, (legally proveable) and the validity of it in point of law must be regarded as open questions. As before remarked, however, the existence of the custom of bounding does not depend upon it, and it is easy to suppose circumstances under which a tin-bound may be valuable without the tin-bounder having power compulsorily to divert another man's stream.

With respect to the fourth objection, it must be observed, that the right to *take* tin would be nugatory without the right to *search* for it, tin not being a substance casually stumbled upon: that the tinner is not likely to spend his time, labour, and money in searching more or longer than a reasonable prospect of success, attended with benefit to the lord as well as himself, may warrant; and, if the possible case be put of an infatuated adventurer persisting in a hopeless search to the injury of himself and the landowner, that such cases are not likely to be frequent, and "*ad ea quæ frequentius accidunt jura adaptantur*:" that no mining custom can authorize damage to build-

(c) By the Stannaries Convocation, 26 Geo. 2, arts. 12, 13, tanners are prohibited from diverting pot-water, or water from any ancient mill, or doing unnecessary damage; and are required (upon notice) to clear rivers into which their rubbish may have been washed, and to prevent the overflow of meadows, pastures, &c. As these provisions, however, seem new enactments rather than declaration of custom, they are probably not to be considered as limiting the custom. See *ante*, p. 35.

ings (*d*) or negligent working (*d*), much less wanton or vexatious: that an action will lie for the abuse of an easement or profit *à prendre*: and the question of use or abuse will be for the jury.

The fifth objection can only be met by contending that the custom is attended with the same incidents as a grant of the tin would be, *viz.* to interfere with other ores or minerals as far as may be necessary to the getting of it and no further; certainly not to make a profit of them. This objection goes to the root of all customs to take mineral productions, for a custom to take *all metals* would confer no right to the slate (*e*) (which might be granted to a quarryman), or a custom to take *clay* would not confer a right to *earth*: grants of any substances short of the whole soil must be attended with similar difficulties in the application of the maxim, *sic utero tuo ut alienum non lædas*, a consideration which Mr. Smirke seems to have overlooked, when he says, "the adventurer avoids any question by taking a lease or license from all parties interested in the different minerals."

The last difficulty Mr. Smirke considers the most serious, and applicable to nearly half the lands subject to tin-bounds; it may be said, however, on the other hand, that the rights of the tin-bounder and the copyholder rest upon the same foundation: and that if the law has permitted the copyholder to acquire a now indefeasible possession of the land against the owner of the fee by custom, that possession may not unreasonably be considered, in the Stannary districts, subject to the right of the tin-bounder, acquired also

(*d*) *Hilton v. Earl Granville.*

(*e*) See *Earl of Rosse v. Wainman*, 15 L. J., Ex. 67.

by custom (possibly still more ancient) (*e*), to dig for minerals under certain restrictions, for the benefit of himself and the lord whose property they are. Indeed the objection of Mr. Smirke might be stated more strongly, applying as it does to all lands in the possession of tenants. If it be said that a tenant for years takes his lands subject to existing bounds, paying less rent in proportion to their effect in decreasing the value of his tenancy, it may be answered that in any land anciently bounded, that is to say, in the greater part of Cornwall and Devonshire, and certainly in all the assessionable manors belonging to the Duchy (*f*), new bounds may be established by the requisite proclamations, within which the boulder may do any amount of damage to the land without compensating the tenant. This consideration certainly much affects the reasonableness of the custom now, when the rights of tenants are no less considered by the law than those of landlords, however little weight it may have had in times when chattel interests were almost disregarded: and it may admit of doubt whether the doctrine of Lord Coke (*g*), "that a custom once reasonable and tolerable, if after it become grievous, and not answerable to the reason whereupon it was grounded, yet is to be"—"taken away by act of Parliament" would be supported by it fullest extent. Whether or not the inconvenience attending the custom call for its abolition by act of Parliament is another question well worthy of consideration.

(*e*) Bracton, l. 4, c. 28, ss. 1, 5; Co. Cop. s. 2 & 10; Co. Litt. by Harg. 108, a. n. (4). Att. Gen. v. Parsona, 2 Tyrwh. 223.

(*f*) Now enfranchised by stat.

(*g*) 2 Inst. 664. Hix v. Gardiner, 2 Bulstr. 195, 196.

The case of *Rogers v. Brenton*, decisively settled no more than that the tin-bounder out of possession, actual or constructive, has no interest at all, thereby putting an end to the much vexed question as to what that interest was ; the effect, however, of that case and of the others which have been referred to, is to leave a strong impression that the custom, as applicable only to owners in possession and *bonâ fide* working, not necessarily continuously, but at intervals sufficiently near to negative *abandonment*, (a question which will always be for the jury), would be supported ; and that at this moment new bounds may be pitched in any waste land, or land previously bounded, and the right to work within them acquired by the requisite proclamations in the Stannaries Court. The term "lands previously bounded," however must obviously be taken with some further qualifications, for the custom clearly cannot extend to the demolition of houses or churches(^h); and what use of "lands previously bounded," would exempt them from new bounds, presents a further question of much difficulty. It is understood that, in fact, attempts are now rarely if ever made to establish new bounds ; as long, however, as such attempts may be made with success, and property is or may be affected by the custom, its existence cannot be disregarded.

The custom in Devonshire, as declared in the convocation rolls of the Stannary Parliaments for that county, differs from that in Cornwall, principally in being a freehold interest descending to the heir, and being unaccompanied by the obligation to pay any

(h) It was stated by one witness in *Rogers v. Brenton*, that the parish church and cemetery of Helston, are now actually situated within tin-bounds.

toll or compensation to the landowner. The Cornish custom having been mainly supported on the ground of its being accompanied by this obligation (*k*), there seems little reason to doubt, that the custom in Devonshire if found by a jury to exist in fact, would be deemed void in law. As, however, it prevails to a very limited extent in Devonshire, and the observations relative to the custom in Cornwall, for the most part apply to it, a separate discussion respecting it is unnecessary.

In a recent case tried before Mr. Justice *Patteson* in Cornwall (*l*), an attempt was made to set up a custom for any person to re-open an adit which had been once opened, though abandoned for any length of time. The adit in question had been unworked within living memory, and from it issued a stream originally used for mining purposes, but which had become sufficiently pure to serve for brewing, and had been used in a brewery for thirty-six years; some adventurers re-opened the adit, spoilt the stream for brewing, and defended an action on the ground of this custom,—which, however, was not found to exist by the jury. It seems probable, however, that if *it had been pleaded* (which it clearly ought to have been to have availed the defendants) a new trial would have been granted on this finding of the jury (*m*).

(*k*) See p. 41, as to the conditions of a good custom, see *Cudden v. Estwick*, 6 Mod. 124. See also *Gateward's case*, 6 Rep. 59, *b*. *Selby v. Robinson*, 2 T. R. 758. *Grinstead v. Marlow*, 4 T. R. 717. *Blewett v. Tregonning*, 3 A. & E. 554. The conditions are, that the party bound should have a benefit, the party claiming be at some charge, and that it should have a reasonable commencement.

(*l*) *Magor v. Chadwick*, 11 A. & E. 571.

(*m*) As to other ancient Cornish customs, see *Year Book*, Mich. 14 Hen. 4, f. 5, A. B. pl. 6. *Chapman v. Chapman*, Marsh's Rep.

Sect. III. The rules which regulate the descent, devolution and transfer of interests in land, by operation of law, and their transmission by will, apply to interests in mines, with no distinction deserving especial notice (*n*).

Sect. IV. The stat. 43 Eliz. c. 2, s. 1, in which poor rates originated, having declared all occupiers of "coal mines," (among other things) rateable to the poor, it was early decided that the express mention of coal mines excluded all others (*o*), and such is at present the law (*p*); the only question that can now arise upon this subject is, whether the workings for ore or other substances are or are not *mines*, for if quarries only, they are rateable (*q*). The distinction between a mine and a quarry is not founded on the difference of the substance raised, but of the mode of obtaining it; workings open and visible from the surface being deemed quarries, while the sinking of shafts, the driving of tunnels, and generally the

54, pl. 82, and Bracton, 271, a. lib. 4, tr. 3, c. 13, s. 2 (ed. 1569). This custom seems remarkable: "Observatur in comitatu Cornubiensi de consuetudine quæ talis est, quod si liber homo ducat nativam aliquam in uxorem ad liberum tenementum et liberum thorum, si ex eis duæ procreantur filiæ, una erit libera, et altera villana."

(*n*) As to rights of co-parceners, see the case of Lord Mounjoy, Godw. 17; 1 And. 367; Co. Litt. 165, a. n. 1, *quare*, whether if a mere right to work descended to co-parceners, it would be distributed in respect to time, as in the case of estovers, right of piscary uncertain, and common *sans nombre*. Co. Litt. 32, a.; Godb. 21; Perk. sec. 341.

(*o*) Governor and Co. for Smelting Lead v. Richardson, 3 Burr. 1341; 1 W. Black. 389. Atkins v. Davis, Cald. 318, 325. R. v. Cunningham, 5 East, 478.

(*p*) R. v. Sedgely, 2 B. & Ad. 65. R. v. Brettell, *ibid*, 424. R. v. Dunsford, 1 A. & E. 568; 4 Nev. & Man. 349.

(*q*) As to what is a mine for this purpose, see R. v. Bettell, 3 B. & Ad. 424. R. v. Sedgely, 2 B. & Ad. 65. R. v. Dunsford, 4 Nev. & Man. 349.

digging under ground, seem the chief features of mining (*r*).

An exception, however, to this rule, has long since been adopted, *viz.* the rateability of tolls or dues payable to the landowner (*s*). The principle of this exception does not appear much more satisfactory than the rule itself, and both have been often questioned: a series of cases, however, some very recent, must be considered as having established them. The stat. of Eliz., as before observed, by mentioning occupiers of *coal mines*, was supposed to have excluded the occupiers of all other mines *as such*, though as observed by Lord *Ellenborough* (*t*), the word *coal-mines* was probably used only by way of example, and not of exclusion. But "*occupiers of land*," were also rateable, and the landowner has been rated under these words, as "*an occupier of land*," by means of the receipts of dues, his interest being distinguished from that of mining adventurers (to have rated whom would have an obvious evasion of the interpretation of the statute established by the decisions above referred to), on the ground that his receipts are without risk (*t*), and tolls or dues from *rent* (which is not rateable) on the ground that they are the actual produce of the land (*v*). Whether the toll be payable by virtue of a custom, as of tin-bounding, or by express agreement, makes no difference (*w*). A reservation of a portion of the ore in a *smelted state*

(*r*) *R. v. Alderbury*, 1 East, 534. *R. v. Woodland*, 2 East, 16. *R. v. Brown*, 8 East, 538.

(*s*) *Rowls v. Gell*, Cowp. 451; 1 Dougl. 304. *R. v. Madden*, cited 3 T. R. 480. *R. v. Agnes*, 3 T. R. 480.

(*t*) *R. v. The Baptist Mill Co.*, 1 Mau. & Sel. 617.

(*v*) *R. v. St Austell*, 5 B. & Ald. 693.

(*w*) *Crease v. Sawle* (in error), 2 Q. B. 862. See *R. v. Paynter*, 7 Q. B. 273.

is in the nature of rent and not rateable (*x*), in a *state fit to be smelted*, is a toll or due—a somewhat subtle distinction as observed by Mr. Justice *Taunton* (*y*); and lately it has been held that *a lessee* of the tolls is rateable though he do not reside in the parish (*z*).

(*x*) *R. v. Earl of Pomfret*, 5 *Mau. & Sel.* 139. See *R. v. Crease*, 11 *A. & E.* 677.

(*y*) *R. v. Tremayne*, 4 *B. & Ad.* 170.

(*z*) *Crease v. Sawle*, *supra*.

CHAPTER II.

OF THE RIGHTS INCIDENT TO THE WORKING OF MINES,
THE INJURIES FREQUENTLY ARISING THEREFROM,
AND THEIR REMEDIES.

Sec. I. It may be stated as a general proposition, that the right to obtain minerals, whether founded on the ownership of them, or on a grant, reservation, custom, or prescription, comprises the right to do all that is necessary towards the convenient working for them, reasonable care being taken to avoid injury to the property and rights of others (*a*). Several cases have settled the application of this rule to certain circumstances, and throw light upon its applicability to others of probable occurrence.

It has been decided, that "the lessor of coal mines does not by implication give power to fell trees, for the use of the mines, and that the rule of law that the grant of a thing carries all things, without which the things granted could not be had, is to be understood of things incident and directly necessary (*b*)."

(*a*) *Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.* Shep. Touch. p. 89; 2 Roll. Abr. N. pl. 1, 2, 3; 1 Saund. 322, *b*. *Earl of Cardigan v. Armitage*, 2 B. & C. 207.

(*b*) *Ld. Darcy v. Askwith*, Hob. 234.

In the case of the *Earl of Cardigan v. Armitage* (c), *Bayley*, J. (delivering the judgment of the Court of Queen's Bench) said, "The incidental power (to the right to dig for coals) would warrant nothing beyond what was strictly necessary for the convenient working of the coals; it would allow of no use of the surface, no deposit on it to a greater extent or for a longer duration than should be necessary, no attendance upon the land of unnecessary persons. It would be questionable at least, whether it would authorize a deposit upon the land for the purposes of sale, and whether it would justify the introduction of purchasers to view the coals." The strictness with which the Court of Queen's Bench have intimated that implied powers incidental to mining are to be construed, suggests the expediency of powers sufficiently ample being expressed in all instruments by which rights of mining are granted or reserved: and it seems that the maxim, "*expressum facit cessare tacitum*," will be applied with great caution to stipulations in such instruments, and with a disposition to regard an express power to do some particular thing, rather as an example of the sort of things permitted, than as an exclusion of other things (d). To give a stipulation a *controlling* power, the intention that it should have that effect must be very plain (e).

Sec. II. With respect to the interpretation of express stipulations, in the case of *Pit v. Lady Clavernith* (f), the vendor of a manor reserved to himself and his heirs

(c) 2 B. & C. 207.

(d) *Stukeley v. Butler*, Hob. 168.

(e) *Winter v. Loveden*, Ld. Raym. 276. *Earl of Cardigan v. Armitage*, *supra*.

(f) 1 Barnard. 318.

a *convenient way-leave*, such as he and his heirs should think proper, for the carriage of coals through a waste within the manor, from certain coal works of his to the river Tyne. An invention had been made about twenty years before, which at the time of the sale had come into frequent use in the North, of making *waggon-ways* for the more easy carriage of coals, which was done "by levelling ground from one place to another, and then laying planks into it, for making a more easy and short conveyance of them;" the defendant, the lessee of some coal works under the heirs of the vendor, by virtue of the power in the reservation, made a *waggon-way* for her coals, upon which the plaintiff filed a bill against her,—the Lord Chancellor made a decretal order, referring it to the Barons of the Exchequer for their opinion, whether a *waggon-way* was within the reservation of a *way-leave*: and they ultimately gave their opinion that it was not (*g*). On the other hand, in the case of *Senhouse v. Christian* (*h*), which (though distinguishable) may seem at first sight at variance with that last quoted, it was held, that a grant in 1722, before *framed waggon-ways* were used of "a free and convenient way, as well an horse-way as a foot-way, as also for carts, waggons, wains, and other carriages . . . over a certain slip of land, from point A. to point B., with license to make causeways,"—authorized the construction in 1784, of a *framed waggon-way* from A. to B.; but not the construction of any ways across the slip in other directions

(*g*) See also *Selby v. Adair* (not reported), referred to 6 M. & W. 186, in which it is said that the Vice Chancellor held a *railway* not comprehended within the reservation of a *way-leave* in a grant dated 1630.

(*h*) 1 T. R. 560.

to surrounding lands purchased by the defendant, the heir of the grantee. The introduction of tram-roads and railways has given rise to further discussion on the applicability of a grant of "way-leave," to ways not contemplated at the time of the grant. This question was recently considered in the case of *Dand v. Kingscote* (i). By a deed, dated in 1630, the grantor conveyed in fee-farm land in the manor of A., "excepting and reserved out of the grant all mines of coals within the fields and territories of A., together with sufficient way-leave and stay-leave to and from the said mines, with liberty of sinking and digging pit and pits." By another deed of the same date he also conveyed adjoining lands in the manor of B., with the same reservation. The grantee of the reserved mines in both manors, being part of one mineral field, made a railway, fenced in with tunnels and embankments, from a part of B., across B. and A., to a river beyond A., for the purpose of shipping coals raised in B. The railway was found by the special case (in which form the questions raised came before the Court) to have been constructed without unnecessary damage, and to be convenient for the carriage and shipping of the coals. The defendant also in B., where the coals were raised, sunk a pit and erected a building of stone, containing a steam engine of fifty horse power, for the purpose of drawing off the water and raising the coal to the surface; he also made a large pond, five feet in depth, and one hundred and fifty-eight feet in circumference, for supplying the engine with water, and erected sheds and other works, occupying altogether about two acres and a half. The

(i) 6 M. & W. 175.

engine and works were found to be necessary for the convenient working of the coal. It was held, firstly, that the separate reservation of the coals, with way-leave, &c., in the two manors, did not confer a right to carry coals found in A. over B., or coals found in B. over A. Whether or not *a railway* could be constructed on such a reservation, it was unnecessary to decide, because in the pleadings the plaintiff had (by a new assignment) admitted that *some railway* might be constructed; it was said, however, that the owner of the mines "was not confined to such description of way as was in use at the time of the grant, and in such a direction as was then convenient." Whether or not the defendant was justified in constructing a railway in the manner he did, was also left undecided, because the case did not find whether such construction was or was not necessary and convenient; it seems, however, that had this question been found in the affirmative such construction would have been justified, although it might have amounted to an occupation of the soil and ouster of the landowner (*j*). It was decided, however, that the erection of the above mentioned engine and works, was, according to the finding of the case, within the terms of the grant. It has been held, that where A. granted to B., his heirs and assigns, liberty to carry a sough or drain through A.'s land into B.'s, and to make two little sough pits in A.'s ground, for the more easy and safe carrying up the tail of the sough, one of which was to be covered in forthwith, and the other to be kept open for examining the sough, so long as was necessary for that purpose,

(*j*) *Quare*, whether making such a railway is an ouster of the landowner; *Doe d. Wawn v. Horn*, 3 M. & W. 333.

and no longer ; that the liberty of making sough pits at any time afterwards, while the object of the grant remained, being necessary for the purpose of repairing the sough, passed as incident thereto (*k*).

It would seem that a grant of the minerals with the usual powers to dig shafts, erect machinery, &c., for the effectual and convenient "mining and working of them," would extend only to the processes necessary for making them marketable, and not, without express mention, to those of smelting (*l*).

A reservation or grant of "coals, seams and veins of coal, iron ore, and all other mines, minerals and metals, which then were or at any time, and from time to time thereafter, should be discovered in and upon the said premises, &c., with free liberty of ingress, egress and regress, to come into and upon the premises, to dig, delve, search for, and get, &c., the said mines, and every part thereof, and to sell and dispose of, take and convey away the same, at their free will and pleasure ; and also to sink shafts, &c., for the raising up works, carrying away and disposing of the same, or any part thereof, making a fair compensation for the damage to be done to the surface of the premises, and to the pasture and crops growing thereon," does not confer a right to undermine buildings of the grantee, without leaving sufficient support for them (*m*).

Sec. III. And not only is the miner bound to exercise caution in interfering with the rights of the owner of the

(*k*) *Hodgson v. Field*, 7 East, 613.

(*l*) See *Sampson v. Easterby*, 9 B. & C. 505. See this case also as to construction of covenants relative to building, repairing, &c. smelting houses. See also the judgment in *Earl of Cardigan v. Armitage*, from which the statement in the text seems a corollary.

(*m*) *Harris v. Riding*, 5 M. & W. 60. See *Hilton v. Lord Granville*, 5 Q. B. 701.

land wherein he is authorized to work, but he must conduct his operations also with reference to the rights of adjacent landowners, and is liable to an action if he interferes with them by *negligent* working within his proper limits (*n*). The amount of care which he is bound to take scarcely admits of an abstract definition, it is illustrated, however, by several cases. In *Rolls Abridg.* (*o*) there is the following passage: "If A. be seised in fee of copyhold land next adjoining the land of B., and A. erect a new house in his copyhold land, and some part of the house is erected in the confines of his land next adjoining the land of B., if B. afterwards digs his land so near the foundation of A.'s house (but no part of the land of A.) that thereby the foundations of the house and the house itself, fall into the pit, yet no action lies against B., because it was A.'s own fault that he built his house so near B.'s land; for he cannot by his act hinder B. from making the best use of his own land that he can . . . but *semble* that a man who has land next adjoining my land cannot dig his land so near mine that thereby my land shall go into his pit; and, therefore, if the action had been brought for that, it would lie." The case of *Wyatt v. Harrison* (*p*) was decided in accordance with this view, Lord Tenterden observing, "if I have laid an additional weight upon my land, it does not follow that the adjacent landowner is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it." This question came before the Court of Exchequer

(*n*) *Dodd v. Holme*, 1 A. & E. 493; 3 Nev. & Man. 739.

(*o*) *Trespass*, (I), pl. 1.

(*p*) 3 B. & Ad. 871.

in the case of *Partridge v. Scott* (q), where *Alderson, B.*, pronounced the judgment of the Court.

“The two questions in this case are of considerable importance. The facts may be shortly thus stated. The plaintiff was possessed of two houses, one an ancient one, and the other built long within twenty years before the subject of the present action occurred. These houses were built on the plaintiff’s land, and considerably within his boundary, and the modern house is stated to have been built on land which had been previously excavated for the purpose of getting coal. No such statement appears in the case as to the ancient house, and the Court cannot, therefore, intend that that house was built originally on excavated land, or that the land has been excavated more than twenty years ago.

“Under these circumstances the question is precisely similar as to both houses, and is one on which the Court do not entertain any doubt. Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land he does not thereby acquire any right of easement, for support, or otherwise, over the land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect. *Wyatt v. Harrison* (r) is precisely in point as to this part of the case, and we entirely agree with the opinion there pronounced.

“In this case, if the land on which the plaintiff’s house was built had not been previously excavated,

(q) 3 M. & W. 228.

(r) 3 B. & Ad. 871.

the defendants might, without injury to the plaintiff, have worked their coal to the extremity of their own land, without even leaving a rib of ten yards as they have done. And if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He has, therefore, by building on ground insufficiently supported, caused the injury to himself, without any fault on the part of the defendants, unless at the time, by some grant, he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house, because it has not existed twenty years; nor as to the old house, because, though erected more than twenty years, it does not appear that the coal under it may not have been excavated within twenty years; and no grant can, at all events, be inferred, nor could the right to any easement become absolute, even under Lord Tenterden's Act, until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the defendant's land."

Canal and Railway Acts generally give an option to the company of purchasing mines, and if they decline to do so, it has been intimated that what inconvenience they may suffer they have mainly brought upon themselves. A Canal Act reserved coal mines to the owners of lands purchased by the company, but required them to give notice to the company if they intended to work within ten yards of the canal, and thereupon empowered the company to inspect the mines and stop the further working of them on payment of compensation; it was held, that the right of the owners to work within ten

yards of the canal was left as it was before the act, if after notice given by them to the company the latter did not purchase their rights, and that the canal being damaged by the nearer approach of the mine, after such notice and non-purchase, no action lay against the coal owner for such injury, which happened by default of the company in not purchasing (*s*). A Canal Act contained clauses providing that the owner of any coal mine within a certain prescribed distance of a canal, should, if desirous of working it, give a certain notice to the company, who were empowered to inspect it, to determine what coal or other minerals might be got at without prejudice to the canal, &c. ; and in case of the company neglecting so to inspect, the mines were permitted to be worked within the prescribed limits : if, on inspection, the company should refuse to allow the mines to be worked, they should pay compensation. Another clause provided, that nothing in the act contained should defeat the right of any owner of lands or grounds, in, upon, or through which the canal, &c., should be made, to the mines lying within or under the lands or grounds to be set out or made use of for such canal, but all such mines were reserved to such owners respectively ; and that it shall be lawful for such owners, subject to the conditions therein contained, to work all such mines, *provided that in working such mines no injury be done to the said navigation*. It was held, that this proviso was to be construed with some qualification, *viz.*, either as importing that the party working the mines was to do no unnecessary damage to the navigation, or no extraordinary damage by

(*s*) Wyerley Canal Company v. Bradley, 7 East, 368.

working the mines out of the usual mode ; and, therefore, where notice had been given by the lessee of a coal mine of his intention to work it under a reservoir belonging to the canal company, and the latter had not purchased his rights within the time limited by the act, that the lessee was entitled to work the mine under such reservoir in the usual and ordinary mode ; and the reservoir having been damaged by reason of such working by the lessee, that no action was maintainable by the company against him for such damage (*t*). Provisions are now made by the Railway Clauses Consolidation Act, relative to possible disputes between railway and mining companies (*u*), on the construction of which no case is believed to have arisen.

The following case was decided on the right to mines within a certain space, with an *exception* of a portion of it.

The vendor of a certain messuage lands, &c., reserved all coal mines, with liberty to enter and sink pits for getting all such coal, and to erect engines and make drains, &c., necessary for working the coal, except as to such lands as lay within 150 yards of the messuage and buildings, and except any homestead. On a case being sent to the Court of Queen's Bench by the Lord Chancellor (after granting an injunction), it was held, that the vendor had the right to dig coals under the messuage, buildings, and homestead, and within 150 yards of them respectively, but was not entitled to sink

(*t*) *The Dudley Canal Navigation Company v. Grazebrook*, 1 B. & Ad. 59. See *R. v. Leeds and Selby Railw. Co.*, 3 A. & E. 683. *Barnsley Canal Co. v. Twibell*, 12 Law J. ch. 434.

(*u*) 8 Vict. c. 20, s. 77, *et seq.* See *Collier's Railway Acts*, 2nd edit. pp. 78—83.

pits, erect engines, or make drains within 150 yards of the messuage or buildings, nor within the homestead (v).

Sec. IV. The right to streams of water, one of great importance to miners, has been the subject of much discussion in the Courts and amongst text writers. Some of the earlier authorities have intimated, in accordance with what was supposed to be the Roman law (w), that the right to running water, like that to light and air, is *publici juris*, and to be acquired by occupancy; and that the first person who makes use of a running stream acquires a right to it against other persons, independently of prescription or custom. This doctrine, however, has been denied in some recent cases, in which the authorities, inclusive of some American cases, have been considered, and the rights of the occupants of streams have been placed on an intelligible foundation (x). Perhaps we are indebted for the clearest exposition of these rights to that great American writer and Judge, Mr. Justice *Story*, who thus explains the American Law, which has been recognised as identical with the English on this subject (y).

(v) *Bowler v. Wolley*, 15 East, 444.

(w) Et quidem naturali jure, communia sunt omnia hæc; aer aqua profluens, et mare et per hoc littera maris. 2 Inst. tit. 1, s. 2. Vinnius, however, in his Commentary on the Institutes, qualifies this doctrine, "*Primum communis est omnium harum rerum usus, ad quem naturâ comparatæ sunt: tum siquid earum rerum per naturam occupari potest id eatenus occupantis fit, quatenus ad occupationem usus ille promiscuus non leditur.*"

(x) See *Mason v. Hill*, 5 B. & Ad. 1. See also *Cox v. Matthews*, 1 Vent. 257. *Prescott v. Phillipps*, cited 6 East, 213. *Bealey v. Shaw*, 6 East, 208. *Glyn v. Nicholas*, 2 Show. 517; *Comberb. 43*. *Sanders v. Newman*, 1 B. & Ald. 258. *Williams v. Morland*, 2 B. & C. 913. *Canham v. Fisk*, 2 Tyrwh. 155; 2 Cro. & J. 126. *Wright v. Howard*, 1 Sim. & Stu. 190; Bl. Com. vol. 2, pp. 14—18. *Hewlins v. Shipham*, 5 B. & C. 221. *Liggins v. Inge*, 7 Bingh. 682. See *Gale on Easements*, 165.

(y) *Tyler v. Wilkinson*, 4 Mason, U. S. R. 397.

"*Primâ facie*, every proprietor upon each bank of a river, is entitled to the land covered with water, in front of this bank to the middle thread of the stream; or, as it is commonly expressed, *ad medium filum aquæ*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But strictly speaking, he has no property in the water itself, but a simple use of it while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of the river, the right being common to all the proprietors on the river; no one has a right to diminish the quantity, which will, according to the natural current, flow to the proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all. The natural stream existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed by operation of law to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows, for that would be to deny any valuable use of it. There may be, and there must be allowed to all, of that which is common, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or accelera-

tion of the natural current indispensable for the general and valuable use of the water perfectly consistent with the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious, by diminishing the value of the common right is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to the public convenience and general good, and is not betrayed into narrow strictures subversive of common sense, nor into an extravagant looseness which would destroy private rights. The maxim is applied, *sic utere tuo ut alienum non lædas.*"

It has been decided that the owner of the land through which the water flows, either above or below, may maintain an action against any person interfering with it, if he have suffered any amount of inconvenience therefrom on any one occasion, though he have never used it before such interference (z). Whether he could maintain an action without proof of any positive inconvenience or detriment to his property, merely on the ground of his right being invaded, or whether such invasion would be merely *injuria sine damno*, has been declared an open question by the Court of Queen's Bench (a). Mr. Gale, however, in his Treatise in Easements, gives some reasons for supposing that mere invasion of a right is the subject of an action (b), not the least of which is, that such

(z) *Bealey v. Shaw*, 6 East, 208. *Williams v. Morland*, 2 B. & C. 910; 4 D. & R. 583.

(a) *Mason v. Hill*, 3 B. & Ad. 312.

(b) See *Ashby v. White*, 2 Ld. Raym. 955; 1 W. Saund. 346, b. note to *Mellou v. Wateman*, *Hobson v. Todd*, 4 T. R. 71. *Pindar v. Wadsworth*, 2 East, 161. *Bower v. Hill*, 1 Bing. N. C. 555. S. C. 2 Scott, 540. *Williams v. Mostyn*, 4 M. & W. 163.

invasion has been pronounced to be "*injuria*," and the existence of "*injuria sine damno*" has been denied.

The right however to the enjoyment of water running subterraneously, has been differently construed from that to streams above ground. In a case indeed at *nisi prius*, which was never reviewed by the Court, Lord *Ellenborough* seems to have denied the existence of any such difference (*b*); in *Acton v. Blundell* (*c*), however, it was distinctly recognised, and the grounds of it explained. In that case the occupier of certain land and a cotton mill, had made a well for the purpose of raising water to supply the mill: the defendants sunk coal pits in their own land, one about three quarters of a mile, the other somewhat less from the well, which had the effect of draining it. On the argument of a bill of exceptions tendered to the ruling of the learned judge who tried the cause, *Tindal*, J. pronounced the judgment of the Court of Common Pleas, of which the following is an extract.

"The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been long continued—in ordinary cases, indeed, time out of mind, and uninterrupted; each man knowing what he receives, and what has always been received from the higher lands, and what he transmits, and what has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or

(*b*) *Balston v. Bensted*, 1 Camp. 463.

(*c*) 12 M. & W. 324.

perhaps it may be considered as a rule of positive law, (which would seem to be the opinion of *Fleta* and *Blackstone*), the origin of which is lost by the progress of time ; or it may not be unfitly treated as laid down by Mr. Justice *Story*, in his judgment in the case of *Tyler v. Wilkinson*, in the Courts of the United States (*d*), as ‘an incident to the land ; and that whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law.’ But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface ; no man can tell what changes these underground sources have undergone in the progress of time ; it may well be that it is only yesterday’s date that they first took the course and direction which enabled them to supply the well : again, no proprietor knows what portion of water is taken from beneath his own soil ; how much he gives originally, or how much he transmits only, or how much he receives : on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well, there can be ground for implying any mutual consent or agreement for ages past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built ; nor, for the same reason, can any trace of a positive law be inferred from

(*d*) 4 *Mason’s (American) Reports*, 401.

long continued acquiescence and submission, whilst the very existence of the underground springs, or of the well may be unknown to the proprietors of the soil. But the difference between the two cases, with respect to the consequences, if the same law is to be applied to both is still more apparent. In the case of the running stream, the owner of the soil thereby transmits the water over its surface ; he receives as much from his higher neighbour as he sends down to his neighbour below, he is neither better nor worse, the level of the water remains the same. But if the man who sinks the well in his own land, can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil ; and thus by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbour, he may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers, when too late, that the appropriation of the water has already been made. Further, the advantages on one side, and the detriment to the other may bear no proportion. The well may be sunk to supply a cottage or a drinking place for cattle : whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can

be confined ; in the present case, the nearest coal pit is at the distance of half a mile from the well, it is obvious the law must equally apply if there is an interval of many miles.

“ Considering, therefore, the state of circumstances upon which the law is grounded in the one case, to be entirely dissimilar from those which exist in the other ; and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust ; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.”

A case of much importance has been very recently decided relative to the degree of care which the owner of a mine is bound to take, to prevent water flowing from his mine into an adjoining one. The plaintiff and defendant occupied adjoining collieries ; a predecessor of the defendant, without his privity, had made certain holes called thirlings in a barrier of coal belonging to the plaintiff which had separated the two collieries ; the defendant in working his mine, broke down a seam of coal of his own, and the consequence was that the water flowed from his mine into the plaintiff's through the thirlings ;—it was held that no duty lay upon him to prevent the water from flowing from his mine into the plaintiff's. It was said by the Court, “ It would seem to be the natural right of each of the owners of two adjoining coal mines, neither being subject to any servitude to the other, to work his own in the manner most convenient and beneficial to himself, although the

natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party. In the present case, it could not be disputed, that but for the excavation of the plaintiff's coal, the defendant would have been entitled to work out the whole of his own coal, for if the space which it had occupied became afterwards filled with water, that would have done no harm to the plaintiff, if his coal also had not been excavated; and if he afterwards excavated his own, and the water flowed in from the defendant's workings, he would not on that account have any right of action for the damage done by it What authority is there for saying that the plaintiff, by working his coal, could alter or abridge the defendant's right to work his own? Surely the reasonable thing is, that the plaintiff should leave part of his own coal to protect his own workings against the influx of water" (*d*).

The right to use running water in a manner injurious to other persons, may, however, be acquired by twenty years uninterrupted use,—such, for example, as the right to let off on the neighbouring land water which has been used for the precipitation of minerals, and has been thereby rendered noxious (*e*). And an easement acquired by the use of water in any particular way for twenty years, will be protected against encroachments as much as the natural right to it appendant to the ownership of the banks.

We have seen that no right accompanies the owner-

(*d*) *Smith v. Kenrick*, 18 L. J., C. P. 172.

(*e*) *Wright v. Williams*, 1 M. & W. 77.

ship of the soil to water percolating through the earth ; it would seem also, that no length of enjoyment could confer an easement in such water (*f*).

But, though a title may be acquired by A. to discharge the water of his mines on the lands of B., by twenty years' user, no converse right accrues to B. to compel A. to continue to do so ; this has been decided chiefly on the ground that A. cannot be supposed to have acquiesced in any user to which B. may have put the water not having power to prevent it (*g*). The case, however, of *Major v. Chadwick* (*h*) may at first sight seem to lead to a contrary doctrine. The plaintiffs complained of the pollution of a stream running to their brewery. The defendants traversed the right of the plaintiffs to the stream. It appeared that the stream flowed from the mouth of an adit in adjoining lands not belonging to the plaintiffs, which had been originally made about fifty years before the action for the purpose of clearing the water from a certain mine, by the owner of the mine, but that the mine had not been worked for upwards of thirty years ; that after the working had been discontinued, the plaintiffs availed themselves of the water to brew beer, and after clearing the adit themselves, had for more than twenty years obtained from it pure water for that purpose, and had erected a brewery there at a great expense. It was admitted, that at the time when the adit was originally made and the mine worked, the water must have been unfit for the uses to which the plaintiffs now applied it. The defendants were owners of other mines (copper

(*f*) *Acton v. Blundell*, *ante*.

(*g*) *Arkwright v. Gell*, 5 M. & W. 203, in which artificial water-courses are distinguished from natural ones.

(*h*) 11 A. & E. 571.

mines), and had lately used the old adit for the purpose of draining them, by which the water had again been made foul and unfit for brewing. It was not shewn that they were connected with or claimed under the owners of the mine or the adit, or of the lands through which it flowed. The defendants, it seems, relied only on a supposed custom in Cornwall, which was not proved (*h*), by virtue of which an adit once artificially made for draining a mine might at any time afterwards be employed by anybody for that purpose. The learned Judge stated to the jury, that "in the absence of custom, artificial watercourses were not distinguished in law from such as were natural: that the same rule applied to them; and that twenty years enjoyment might warrant the jury in finding in favour of the right;" on the case coming before the Court, Lord *Denman* said, "we are by no means prepared to say, that the circumstances under which a watercourse has been enjoyed, may not prove it to be without right: or, that a universal practice in the neighbourhood, might not lead to fix the party with knowledge, that those who cleared a mine by an adit notoriously reserved to themselves the right of working a mine at any time. But this view was never pressed on the learned Judge at the trial, the defendants relying on proof of their custom, and electing to stand or fall by the opinion the jury might form upon it. The imputed misdirection is, that the law of watercourses is the same whether natural or artificial. We think this was no misdirection, but clearly right. The contrary proposition, that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the use of the water,

(*h*) See *ante*, p. 54.

if proved to have been originally artificial, seems to us quite indefensible."

Without attempting to impugn the decision in this case, which may be distinguished, if necessary, from *Arkwright v. Gell*, on the ground (among others), that here the defendants were mere wrongdoers, having no interest in the mine, it may be questioned whether the expression used by the learned Judge, viz. that "in the absence of custom, artificial watercourses are not to be distinguished in law from natural ones" is correct, without some qualification. This proposition is not necessarily true because the contrary proposition is false. Though it be false, that "all artificial watercourses are, in the absence of custom, distinguished from natural ones"—it does not follow that "no artificial watercourses are, in the absence of custom, distinguished from natural ones"—the primary import of the words of the learned Judge. *Arkwright v. Gell* decides that some are so distinguished. But if the words of the learned Judge be taken to mean, that "artificial watercourses, in the absence of the custom, are not necessarily distinguished from natural ones," the ruling is consistent with that case and the principles of law in which it was decided.

Sect. 5. Custom or prescription may confer not only the right to work for minerals, but greater powers than would be attached to that right by mere operation of law (i). It has been seen that the Court of Queen's Bench (j) have expressed a doubt whether the power of keeping ore upon the land, for the purpose of sale,

(i) *Bourne v. Taylor*, 10 East, 189. *Paddock v. Forrester*, 3 M. & G. 903. *Bateson v. Green*, 5 T. R. 411.

(j) *Earl of Cardigan v. Armitage*, *supra*, p. 58.

would necessarily follow the right of working for minerals. This doubt would seriously affect the utility of working under tin-bounds; it is apprehended, however, that if necessary, a custom might be proved to retain the ore upon the land within the bounds as long as might be convenient for the purposes of sale, and that such a custom would not be held unreasonable. A custom, however, that "where the customary tenant of a manor has coal mines lying under the freehold lands of other customary tenants, within and parcel of the manor, he may sink pits in these lands to get the coal, &c., may lay the coals when got, and the earth and rubbish, &c., in the land *near to such pits*, such lands being customary tenements and parcel of the manor, there to remain and continue, (not saying how long, or for a convenient time), may lay and continue wood there for the necessary use of the pits, may take away in carts and waggons part (not saying how much) of the coals, and burn and make into cinders the other parts thereof at his will and pleasure," was held a bad custom, as being uncertain and unreasonable, for it might deprive the tenant of the whole benefit of the land (*k*).

So a custom by the owner of a brick kiln to take away from a close, "so much clay as at any time might be required by him," was held unreasonable, as amounting to a possible destruction of the whole close (*l*). A custom "to dig and make underground all mines, pits, &c., under the messuages, dwelling-houses, buildings, and lands within a manor as may be necessary and convenient for the working of mines,

(*k*) Broadbent v. Wilks, Willes, 360.

(*l*) Clayton v. Corby, 5 Q. B. 415.

doing no more than necessary damage for the purpose aforesaid, and paying to the tenants and occupiers of the surface of lands damaged thereby a reasonable compensation, when demanded, for the use of the surface, or any damage occasioned thereto, in and about the working of the mines, but without making compensation for any damage occasioned to any messuages, dwelling-houses, or other buildings, within or part and parcel of the manor by or for the purpose of working the said mines," was held void whether pleaded as a prescription or custom(*m*).

Sect. 6. The legal owner or lessee of a mine, whether in or out of possession, may support ejectment(*n*) against a wrongful occupier. It has been held also that he may maintain an action for use and occupation on an agreement for a lease of land and minerals, where the land has been occupied by the digging of shafts(*o*).

As the ordinary payment of dues is not considered strictly rent, but rather as an exception of part of the thing granted(*p*), it is not recoverable as such by action or distress. Trover, however, may be maintained for the portion of the ore reserved(*q*). An action of covenant may, of course, be brought for the breach of a covenant under seal, or of special assumpsit for the non-rendering of dues according to an agreement not under seal.

An agreement to work mines "as long as they are fairly workable," does not bind the miner to work as long as there is ore to be found, but as long as working

(*m*) *Hilton v. Earl Granville*, 5 Q. B. 791.

(*n*) *Harbottle v. Peacock*, Cro. Jac. 21. *Comyn v. Kyneto*, *ibid.* 150.

(*o*) *Jones v. Reynolds*, 7 C. & P. 335; 4 A. & E. 805.

(*p*) Co. Litt. 47, a. 142, a.

(*q*) *Rowe v. Brenton*, 3 Man. & Ry. 133; 8 B. & C. 737.

is profitable (*r*). And in one case, the Court of Chancery has relieved the lessee of a colliery at the rate of so much per wey, from the effect of a covenant in his lease to work, on the colliery ceasing to be profitable, and his offering to pay for all the coal that could be got (*s*).

If in possession, the lessee of a mine may maintain trespass for any direct injuries to it, or trover for the removal of the ore and machinery; if out of possession, his only remedy for injuries is an action on the case.

Incorporeal hereditaments are assumed by the law to be incapable of possession, and a mere license to work mines is an incorporeal hereditament (*t*). And yet it has been said that a party actually in possession of a mine under such a license, may, if he be ousted, support ejectment, an action which assumes the right of possession to be in the plaintiff, and the actual possession in the defendant. And if ejectment will lie under such circumstances for an ouster, it may be assumed that trespass will lie for an injury. This apparent incongruity, if it be such, is explained by the consideration that ejectment is brought not to recover the right to work, but the possession of a certain mine, ores, diggings, &c., the right to possess which is evidenced by the fact of the plaintiff's possession before ouster, coupled with a license, explaining and authorizing that possession; and that trespass is brought not for interference with the right of working, but for injury to the works. Accordingly it has been held that the licensee out of possession cannot support ejectment (*u*);

(*r*) *Jones v. Shears*, 7 C. & P. 346.

(*s*) *Brown v. Morris*, 2 Bro. Ch. Ca. 311.

(*t*) *Doe d. Hanley v. Wood*, 2 B. & Ald. 724. *Muskett v. Hill*, 5 Bing. N. C. 694.

(*u*) *Doe d. Hanley v. Wood*, *ante*.

and it is equally clear that he could not support trespass. It seems doubtful whether ejectment could be brought for an unopened mine, for it is a question whether the sheriff could deliver possession of it (*v*). The lessee and licensee of a mine, if in possession, seem to have very much the same rights and remedies; if out of possession, their remedies for injuries to the mine are also the same, being confined to an action on the case (*w*), and their positions differ chiefly in this, that the one may maintain ejectment, the other cannot.

Again, if the right to a mine be accompanied by possession, the general rule is, that case is the only remedy for *consequential*, as distinguished from *direct* injuries, which are the subject of trespass (*x*).

Where injuries are committed by mining operations, it is sometimes a question who is responsible for them, whether the workmen only, the agent or manager, or the proprietors of the mines, or all of these parties, and in what form of action.

The liability of the master for the acts of the servant of various kinds, and in various forms of action, has undergone discussion in a long series of cases, some not very easily reconcileable with others. The result of them may, perhaps, be correctly stated in these general propositions.

1. That the master is not answerable at all for injuries committed by the servant wilfully, or out of the scope of his employment (*y*).

(*v*) *Sayer v. Piece*, 1 Ves. sen. 234.

(*w*) *Muskett v. Hill*, *ante*.

(*x*) As to distinction between injuries which are the subject of trespass and case, see *Scott v. Shepherd*, 1 Smith's Lead. Cas. 210, and the notes thereto.

(*y*) *M'Manus v. Crickett*, 1 East, 106. *Brown v. Copley*, 7 M. & G. 559.

2. That the master is liable in *trespass* for those acts only of the servant which he authorizes expressly or impliedly (*y*).

3. That the master is liable in *case* for negligent acts of his servant, not authorized or known of by him, if they are such as are incident to the nature and scope of his employment (*z*).

Some cases have been decided illustrating the application of these propositions to the relations of mining adventurers with their agents and workmen.

In *Littledale v. The Earl of Lonsdale*, a verdict was obtained in an action on the case against Lord Lonsdale as proprietor of a coal mine, for his workmen having so negligently cut certain drifts as suddenly to let off a large quantity of water which had accumulated in the mine, the rush of which injured the foundations of the plaintiff's house (*a*). The commentary of Chief Justice *Eyre* on this case (*b*) is fully as instructive as the case itself; he says, "Lord Lonsdale's colliery was worked in such a manner by his agents and servants (or, possibly, by his contractors, for that would make no difference) that an injury was done to the plaintiff's house, and his lordship was held responsible. Why? Because the injury was done in the course of *his* working the colliery: whether he worked it by agents, by servants, or by contractors, still it was his work: and though another person may have contracted with

(*y*) *Lyons v. Martin*, 8 A. & E. 512. *Jarmain v. Hooper*, 6 M. & G. 827, and see the cases there cited. *Freeman v. Rosher*, Q. B., not yet reported.

(*z*) *Littledale v. Ld. Lonsdale*, 2 H. Bl. 268; 2 Anst. 356. *Morley v. Gaisford*, 2 H. Bl. 442. *Huggett v. Montgomery*, 2 New Rep. 446.

(*a*) 2 H. Bl. 268; 2 Anst. 356, S. C.

(*b*) In *Bush v. Heinman*, 1 Bos. & Pull. 404.

him for the management of the whole concern without his interference, yet the work being carried on for his benefit, and on his property, all the persons employed must have been considered as his agents and servants, notwithstanding any such arrangement, and he must have been responsible to all the world on the principle of "*sic utere tuo ut alienum non lædas*." Lord Lonsdale having empowered the contractor to appoint such persons under him as he should think fit, the persons appointed would in contemplation of law have been the agents and servants of Lord Lonsdale. Nor can I think that it would have made any difference, if the injury complained of had arisen from his lordship's coals having been placed by the workmen on the premises of Mr. Littledale, *since it would have been impossible to distinguish such an act from the general course of business in which they were engaged*, the whole of which business was carried on either by the express direction of Lord Lonsdale or under a presumed authority from him." The judgment itself in the case of *Bush v. Heinman*, in the course of which these observations were made, went the length of holding the owner of a house adjoining a road liable for the upsetting of a carriage by a heap of lime placed in the road by a workman employed by a sub-contractor for repairing the house (c). In the case of *Stone v. Cartwright* (d), the plaintiffs declared as owners of a close and dwelling-house, against the defendant, for negligently working a coal mine, so as to leave insufficient

(c) See, however, *Allen v. Hayward*, 15 L. J., Q. B. 99, in which the liabilities of a principal for the negligence of his contractor were discussed and the cases reviewed.

(d) 6 T. R. 411.

pillars for supporting the house and land, whereby the foundations were injured; it appeared that the mine belonged to an infant, and that the defendant had been appointed agent and manager by the Court of Chancery: that he employed a bailiff under him to superintend the work; that he hired and dismissed miners at pleasure, but took no personal concern in the business, was not present when the injury complained of was done, nor had given any particular orders for working the mine in the manner which had occasioned it. On this evidence Lord *Kenyon* was of opinion that the action could not be maintained against the defendant, who was the middle man, but that it ought to have been brought either against the person who actually committed the trespass, or against the superior, the owner of the colliery, for whose benefit the work was carried on, and this ruling was afterwards supported by the Court of Queen's Bench.

It is apprehended however, that a mining agent habitually present at the works, as most mining agents are in Devonshire and Cornwall, would be held liable for negligent working, as well as the adventurers (e).

Sect. 7. Injunctions have always been obtainable from the Courts of Equity, to restrain the working of mines where it amounted to waste, and the remedy has been extended to cases of trespass (f): if, however, there be a legal question, an injunction to restrain working will not generally be granted until after that question has been determined, except in cases where irrepar-

(e) See *Wilson v. Peto*, 6 Moore, 47. *Witte v. Hayne*, 2 D. & R. 33, and dictum of Lawrence, J., in *Stone v. Cartwright*, *supra*.

(f) *Mitchell v. Dors*, 6 Ves. 147. *Earl Cowper v. Baker*, 17 Ves. 128. *Player v. Roberts*, W. Jones, 243.

able mischief is likely to ensue (*g*). And where an equitable question is pending, the Court will not without strong grounds grant an injunction on motion, before the suit is decided. Indeed much reluctance (*h*) has been expressed to grant injunctions prohibiting the working of mines, on the ground that the stoppage of the works is generally in itself a serious injury, possibly greater than any description of working; and the Courts will never interfere in this way in behalf of a party who has delayed making the application, until great expense has been incurred by those whom he seeks to restrain (*i*).

The remedies, legal and equitable, for wrongs incident to contracts, express or implied between mining partners and the public, or among themselves, will be discussed in the next chapter.

(*g*) *Gibson v. Smith*, Barn. Ch. Rep. 497. *Norway v. Rowe*, 19 Ves. 144. *Whitfield v. Bevil*, 2 P. Wms. 240.

(*h*) Per Lord Hardwicke, *Anon. Amb.* 209.

(*i*) See *Field v. Beaumont*, 1 Swanst. 204. *Gray v. Duke of Northumberland*, 13 Ves. 236; 17 Ves. 282. *Birmingham Canal Company v. Lloyd*, 18 Ves. 515.

CHAPTER III.

OF MINING PARTNERSHIPS.

SECT. 1.—A landowner who works mines in his own ground, and sells the ore, is not a trader, at least within the meaning of the Bankrupt Laws (*a*); nor are two or more joint tenants or tenants in common of land, who work mines, necessarily so, even if they work with a common fund (*b*). A question of some nicety sometimes arises whether persons working mines are trading partners, or mere joint occupiers of land, using the minerals as part of its produce. The result of the cases on this subject (some of which are somewhat conflicting) may be stated to be, that this question will turn on the consideration, whether the land be obtained wholly or principally for the purpose of trading in the ore, or whether the selling of the ore be only incidental or appurtenant to the occupation of the land (*c*). Where, however, companies of adventurers have been formed for the purpose of mining, and obtained leases either of the land or the minerals,

(*a*) *Port v. Turton*, 2 Wils. 169. *Ex parte Gardiner*, 1 Rose, 377. *Paul v. Downing*, Moo. & M. 203. *Ex parte Atkinson*, 1 M., D. & G. 300.

(*b*) *Crawshaw v. Maule*, 1 Swanst. 523. *Jefferies v. Smith*, 3 Russ. 158.

(*c*) *Fereday v. Wightwick*, 1 Russ. & M. 45.

or licenses to work in pursuance of that object, the Courts of equity have long since recognised such associations as a species of trading partnerships (*d*).

Sect. 2.—Few mines, indeed, belong to one or a small number of proprietors, by far the greater part of them being worked by associations more numerous than ordinary trading partnerships: for the expense of effective mining operations is generally beyond the means of individuals, and the risk is such that few are willing to venture in them all or the greater part of their property. This and other peculiar features of mining partnerships have been recognised by our law, not the least virtue of which is its adaptability to the convenience of the trading classes.

The dissolution of partnerships so numerous by the death, bankruptcy, outlawry, or felony of any one partner, would have been incompatible with that continuous working of a mine which is necessary to success. It would have been highly inconvenient if no partner had been allowed to part with his share without the consent of each of his co-partners, moreover the spirit of speculation and adventure, without which concerns so hazardous as those of mining would seldom be commenced or persevered in, and the fluctuating nature of the property indicated the expediency of a ready transferability of shares. Again it would have been somewhat hard upon the mining adventurer if each of his numerous associates whom he had not the means of selecting, had power to bind him by engagements with the public, as extensive as those of partners in ordinary trading concerns. Accordingly

(*d*) *Crawshaw v. Maule*, 1 Swanst. 523. See *post*.

mining partnerships were early recognised as differing from ordinary trading partnerships, in not being founded on the *delectus personæ*, from which principle the rights and obligations of ordinary trading partners are mainly derived. It was decided, after many doubts, that the mining partner had a right either to relinquish or transfer his share without the consent of his co-partners—and that upon his death or bankruptcy, the law, instead of dissolving the partnership, would transfer it to his executors or assignees—and the power of partners to bind each other by engagements entered into with non-partners were restricted.

Sect. 3.—The search for tin and copper, the principal and peculiar mining productions of Cornwall and Devonshire has been, on the whole, more precarious than that for coal, and to some extent than that for iron, while capital has been scarcer in these counties than in the great trading and manufacturing districts within range of which the principal coal and iron mines are situated. These, and perhaps other causes, have given rise to numerous small and experimental associations in these counties, commencing with little capital, though many shareholders, wanting the stability, consistence, and regular organization of the more opulent companies of the North.

These associations have found what is commonly called the “cost-book” system of management, the most convenient for their purposes, and many have retained it after success has introduced a different class of shareholders, and changed the character of the concern, while others have in time outgrown the simplicity of the cost-book type, and assumed the features of joint stock companies.

Companies known by the name of joint stock companies, have been long prevalent in this country, some of which have secured to themselves privileges by charters and acts of Parliament, while others, assuming more or less the character of corporations, have either contravened, or narrowly steered clear of, the rules of the common law, and the provisions of the Bubble Act (*e*), until the accumulation of such companies, together with the unsettled state of the law respecting them, gave rise to the comprehensive measure passed in 1845 for defining and regulating their powers (*f*).¹

It was felt, however, that the cumbrous machinery forced upon those companies, (which has proved sufficiently embarrassing to many of them,) would have crushed in their birth the greater part of the puny associations, in which the mines of Cornwall and Devonshire commonly originate, moreover companies under the cost-book system, had never so far encroached upon the privileges of corporations as to profess to restrict the liability of members to the amount of their shares, so far as creditors were concerned, the assumption of which privilege by joint stock companies, as an inducement for procuring shareholders, was their most odious feature to the Courts of common law and of equity (*g*), and in a great measure led to the statute which regulates them. The transference indeed of shares at the will of the holder, another assumed privilege of joint stock companies, always

(*e*) 6 Geo. 1, c. 18, repealed by 6 Geo. 4, c. 91.

(*f*) 7 & 8 Vict. c. 110.

(*g*) See *Josephs v. Pebrer*, 3 B. & C. 369. *Brown v. Holt*, 4 Taunt. 567. *Ellison v. Bignold*, 2 Jac. & Walk. 503. See also Wordsworth on Joint Stock Companies, 4th edit., p. 54—57.

viewed with disfavour by the Courts, had, though often questioned, been conceded to the peculiar nature of mining companies, partly on the ground of convenience, partly because of the mixed landed and commercial character of mining concerns, in which each partner has commonly a legal or equitable tenancy in common in lands or minerals, which the law allows him to transfer without the consent of his co-tenants. Cost-book companies in short had neither brought upon themselves, nor were strong enough to bear the ponderous fetters imposed upon joint stock companies, and were, for these, or possibly other reasons, expressly exempted from the operation of the act.

Such mining companies (commonly called *scrip* companies), as have been registered under that act, now fall within the general law relating to joint stock companies, a discussion on which, would be beyond the scope of this treatise, and for which the reader is referred to the treatises on joint stock companies. Mines under the cost-book system, however, occupy a somewhat anomalous position, more so since the passing of the act referred to than before, between joint stock companies on the one hand, and ordinary trading partnerships on the other. It is deemed of some importance to ascertain what that position is, and to refer to several recent cases which illustrate some questions arising out of it.

Before going farther, it is necessary to inquire, what is the cost-book system? what mode of conducting a mine by a set of adventurers, about twenty-five, will exempt them from the pains and penalties consequent on non-registration under the Joint Stock Companies' Act?

The origin and formation of a mining company under the cost-book system in its simplest form may be thus described.

A number of adventurers, who have obtained permission from the owner of the land to work a lode, assemble ; they decide on the number of shares into which their capital is to be divided, and the number to be allotted to each ; they appoint an agent, commonly called a purser, for the purpose of managing the affairs of the mine ; and enter in a book called the cost-book, the minutes of their proceedings, which are signed by all present. A license to try for ores for twelve months or some short period is then obtained, followed, if the search be promising, by a sett, that is, a lease of the minerals or a license to dig, or both, granted by the landowner to the purser, or to one or two of the adventurers, without any expression of trust on their part for the rest or any other persons, for a term of years, commonly twenty-one, stipulating for the annual payment of some portion of the ore raised. The purser superintends the works, orders the necessary materials, keeps the cost-book, in which he enters all the proceeds and disbursements of the mine, the names of the shareholders, together with the account for and against each, and the transfer of shares whenever they are transferred ; he makes calls such as have been agreed to at a general meeting, and convenes those meetings by circular at regular intervals, commonly of two months. These general meetings review the accounts and report of the purser, and pass resolutions, either declaring dividends or authorizing calls, and directing the mode of carrying on the mine. It is understood that any adventurer may relinquish his

share and with it his liabilities, at least as far as his partners are concerned, by giving notice of relinquishment in writing to the purser, and settling his account with the mine (*h*).

Such, it is believed, are the leading features of the cost-book system in its ordinary and simplest form. These features, however, are in many instances departed from, even in mines professing to be conducted under that system, while others are sometimes introduced bearing so strong a resemblance to the joint stock company type, as to make it difficult to pronounce as to the character of the concern.

Sect. 4. It is clear that a company cannot escape from the provisions relating to joint stock companies, if they act as a joint stock company, by merely calling themselves a company under the cost-book system, or setting a cost-book, or entering into a deed of partnership declaring that the mine shall be conducted on the cost-book system. On the other hand, it cannot be supposed that every deviation from the model of that system which has been described can subject a set of adventurers to the pains and penalties of non-registration.

It is very difficult to say what deviations will be followed by such consequences, or to draw the line of demarcation, but it is somewhat less difficult to indicate some of the prominent features of the cost-book system, an acquaintance with which will make it easy to decide the character of the concern in many cases, and will be a guide in all.

(*h*) It is believed to be a somewhat doubtful point, what interest, if any, a partner *relinquishing* his share has in the materials, &c. if he transfers it indeed, no such question arises, for the transferee takes the whole of his interest whatever it be.

In the first place, the keeping of a *cost-book*, containing the matters above described, and to which every adventurer has access, is the most obvious, and perhaps, important feature (i). There are other features, however, not indeed equally distinct and invariable which distinguish the cost-book system from ordinary trading partnerships on the one hand, and joint stock companies on the other.

The principal distinction from ordinary trading partnerships seems to be the absence of the *delectus personæ*.

In ordinary trading partnerships, each partner chooses those with whom to embark and continue his fortunes: it is obviously inconsistent with the voluntary character of such associations, that a partner should have the power of transferring his shares without the consent of his co-partner, or should he be succeeded on his death or bankruptcy, by his executors or assignees; the dissolution, therefore, of such partnerships is a necessary consequence of either of these events. Again, the liabilities of partners for the acts of each other in the course of carrying on the business, such as drawing bills of exchange, depend upon the same choice of associates, and the limitation of them in cost-book societies is founded on the absence of such choice.

Should a cost-book company endeavour to introduce the principle of "*delectus personæ*," for example, by stipulating in a deed of settlement that shares shall not be transferred without the consent of the company, or in any way restricting the transfer of them, it would be a

(i) It is believed that a system very like the cost-book prevails in Germany—where a book containing the same species of entries is required by law to be kept in a certain class of mines.

grave question whether they would not essentially depart from their system in the direction of ordinary trading partnerships, and like such partnerships come within the operation of the act, if consisting of more than twenty-five members.

The cost-book system seems mainly distinguishable from that of joint stock companies by the control directly exercised by the whole body of the shareholders over the management of the concern.

They appoint a purser, who acts as the servant of all, whose functions are purely executive, who is removeable at pleasure, and accountable to frequent meetings of all the shareholders, at which meetings only the general affairs of the company are deliberated upon and regulated, dividends declared or calls made. In short the constitution of the cost-book company may be characterised as republican, compared with that of the joint stock company, which delegates its powers in a great measure to an aristocracy of directors. It cannot indeed be supposed that the delegation subject to its periodical resumption of authority to more than one person, or even to a committee, would necessarily make a material alteration in the cost-book type—in extensive mines there are commonly one or more “captains,” who are in the habit of ordering materials as well as the purser, and in some cases the functions of purser are discharged by a committee. But should powers beyond those usually exercised by the purser, for example, the borrowing monies, the drawing bills, or the making of calls, or auditing and passing accounts, be delegated to a board of directors, or a committee of management, or to a select body of shareholders by any other name, and the general meeting of shareholders be discontinued and held at rare intervals, it is appre-

hended that the character of the cost-book system would be essentially departed from.

Having endeavoured to define the nature of the cost-book system with as much accuracy as the subject admits, it is proposed to consider the effect of the principal cases bearing upon the rights and liabilities of shareholders to the public, and among themselves.

Sec. 5. The former species of liability has been discussed in a series of cases in the common law Courts, some decided relative to mines carried on strictly under the cost-book system, others with reference to associations assuming more or less the character of joint stock companies. As these companies, however, were not, as now, separated by a distinct line of demarcation from cost-book companies, all these cases will throw light upon the present inquiry, though little applicable to the circumstances of mines registered under the Act. The first case to which it is thought necessary to refer, is that of *Vice v. Lady Anson* (*k*). This was an action brought for goods sold, and materials furnished for the working of a mine called Wheal Concord: the plaintiff at the time of furnishing the goods, had no knowledge of Lady Anson's being a shareholder: the evidence on which he sought to charge her with the debt was this: it was shewn that she had received certificates of shares in this form, "Wheal Concord Tin and Copper Mine Company, No. 133. These are to certify that the Viscountess Dowager Anson is the proprietor of the share or No. 133, being one share of the Wheal Concord Mine, situate in the parish of St. Agnes, in the county of Cornwall, and that her name is

(*k*) 7 B. & C. 409

duly registered in the cost-book of the said mine, subject to the rules, regulations, and orders of the said company, and that the said Viscountess Dowager Anson, her executors, administrators, and assigns, are entitled to the profits and advantages of such share. By order of the directors, as witness this 14th day of June, in the year of our Lord, 1822. Christopher Vaux, secretary to the said mine." It was proved that she had paid the deposit on some shares, and had spoken and written of herself (in private letters), as a shareholder of the company. The cause was tried before Lord *Tenterden*, C. J., who thus addressed the jury (1).

"It is clear, in this case, that the plaintiff did not actually give credit to Lady Anson, and that she never held herself out to the world as a partner. If, therefore, she is chargeable, she can only be so on the ground that she is really interested; and no mistaken supposition of her own that she was so would make her liable, unless it were communicated to the plaintiff so as to mislead him. The partnership, if any, is not strictly a trading partnership; it is one formed for the purpose of working a mine, a species of real estate, and the plaintiff's claim is for labour and goods employed in working that mine. An interest in a real estate can only pass by certain formalities; and it is clear that the certificates are not sufficient to pass it, nor would the registration in the cost-book of the company, as mentioned in them, even if it were made, of which there is no proof, be so. Is there then any evidence from which you can conclude that Lady

(1) 7 B. & C. 411.

Anson ever had any interest in the mines conveyed to her? The history of the mine is not much explained; but it appears that one *Thomas* had something to do with it in 1822, before the company was thought of, and we hear of no one else. It is not pretended that Lady Anson derived any interest from any one else, and it is not clear, even, that he had any. If he had none, he could communicate none: if he had any, Lady Anson would be liable or not, as he had transmitted it to her or not. His name is not on the certificates; they do not profess to pass anything from him, or to make him accountable for the money paid upon them, or for the profits arising from the mine. Directors are mentioned, but he is not shewn to be one of them, or in any way connected with them. The certificates, therefore, which clearly in themselves do not pass any interest, seem not even to furnish any evidence that an interest had passed from *Thomas*, or from any one else to Lady Anson (*m*); the question which you have to consider is, whether it is made out to your satisfaction that Lady Anson had any interest in the mine? I think it is not." The plaintiff's counsel then elected to be nonsuited.

A rule having been obtained to set aside the nonsuit, was afterwards discharged, Lord *Tenterden* observing, (p. 413), "The plaintiff at the time when he supplied the goods, did not know that the defendant either had, or thought she had, any interest in the mine. He did not, therefore, supply the goods on her credit. The fact of her having thought that she had such interest, that being wholly unknown to the plaintiff at the time when he supplied the goods, will not make her liable

(*m*) See this case reported, 1 Moo. & M. 96.

for these goods. Her having expressed an opinion that she was so, might be *prima facie* evidence that she had an interest—but the other facts in the case shew that she had not any interest. She thought she had an interest because she had paid her deposits and received her certificates, but those certificates pass no interest whatever. It did not appear who the directors were, or that they had any authority to issue such certificates. The defendant, therefore, had no interest in this mine, and is not liable in this action.”

It has been thought proper to state this case somewhat at length, because it is referred to in almost every subsequent case, a consideration however of some of those cases, as well as some others which had been before decided in equity, will tend to shew that its authority cannot now be relied upon to its full extent (n).

(n) This decision related to what is called a scrip mine. The transferability of shares in a *cost-book* mine, by a mere entry in the cost-book by the purser, was recently recognised incidentally in a case of *Reynolds, Executor, v. Bassett, Executor*, which came by appeal before the Lord Warden of the Stannaries. This case is not reported, and for the following note of it, the author is indebted to Mr. Smirke. An issue was directed by the equity side of the Vice Warden's Court to the common law side, to determine whether the plaintiff below was entitled to certain shares in a cost-book mine. The plaintiff in the Court below, produced the cost-book, which was kept by the testator of the defendant, who was purser of the mine, and also a shareholder, and shewed that the name of a Mr. Bassett, under whom he claimed, had been inserted in the cost-book by the testator of the defendant, as the holder of certain shares transferred to him by the testator of the defendant. The name, however, had been erased by cancellation, it did not appear when or under what circumstances. The Vice Warden seems to have directed the jury that the entry in the cost-book was proof of the defendant's testator having transferred the shares to the plaintiff's testator, and to have left it to them to say whether there was sufficient evidence of those shares having been relinquished or re-transferred. The jury found for the plaintiff. The Court of Appeal, consisting of the Lord Warden, assisted by the

This case was followed in 1829, by that of *Dickinson v. Valpy (o)*. An action was brought by an indorsee for value of a bill of exchange, purporting to be drawn and accepted by the Cornwall and Devonshire Mining Company, against the defendant, as a partner in that company. Evidence was given that certain persons had associated themselves for the formation of a company for working mines in Devonshire and Cornwall, that at a meeting they had resolved that a company should be formed with a capital divided into shares, that mines should be purchased, and that there should be directors, a treasurer, a secretary and other officers, and a banker to the company—these resolutions were advertised in the newspapers. A counting-house was taken in London, clerks engaged, a contract was entered into for the purchase of mines in Cornwall, an agent was employed to reside there, and some of the mines were actually worked. The defendant applied for and obtained shares, paid an instalment on them, and received certain printed receipts, called scrip receipts. He afterwards took these receipts to the counting-house, where there was a meeting of directors, paid a second instalment, and signed a deed (which was not produced). He subsequently attended a general meeting of the shareholders. The defendant tendered evidence of his having said at this meeting that he attended for the purpose only of repudiating his connexion with the company, which, however, was

Lord Chancellor, Lord Lyndhurst, and Mr. Pemberton Leigh, decided that this direction was right, and that the verdict of the jury was not against evidence. The Court said, "We think there was not a mere contract but a complete transfer—then, was there a re-transfer by Bassett? There is no proof of one, and the jury have negatived any; nothing could be fairer than the direction to the jury."

(o) 10 B. & C. 129.

rejected by the learned Judge. It appeared further that the bill was drawn and accepted in pursuance of a resolution of the directors. On the case coming before the Court on a motion (in pursuance of leave) to enter a nonsuit, some doubt seems to have been entertained as to whether there was sufficient evidence of the defendant's having an interest in the concern—it became unnecessary however to decide this as the Court was unanimously of opinion, that the directors were shewn to have no power to bind shareholders by drawing bills of exchange. "On this point," *Bayley*, J. says, "the only question which could be submitted to the jury was, whether companies instituted for similar purposes, had constantly been in the habit of drawing and accepting bills? or whether it was absolutely necessary for the purpose of carrying on the concern, that there should have been such a power? There was no evidence to warrant the Judge in leaving those questions to the jury."

Littledale, J. says, "In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another, by drawing and accepting bills, because the drawing and accepting bills is necessary for the purposes of carrying on a trading partnership: but it does not follow that it is necessary for carrying on the business of a mining company. Evidence of the nature of the company ought to have been given, to shew that in order to carry into effect the purposes for which it was instituted, it was necessary that individual members should have the power of binding the others, by drawing and accepting bills of exchange . . . even if it were necessary for the purpose of carrying on a mining concern . . . it

was incumbent on the plaintiff, in this case, to have shewn either from the very nature of this company, that it was *necessary*, or from the practice in other similar companies, that it was *usual*, for if it were necessary or usual, it would be reasonable that the directors should have such a power, and the law would imply it." *Parke, J.*, after discussing whether the evidence shewed a complete or merely an inchoate partnership (a question of great importance which frequently arises in cases of railways and joint stock companies, but is not so likely to occur with reference to mines under the cost-book system (*p*)), proceeds, "supposing that the defendant was a complete partner, there is another question upon which this case may be decided: that is, that at all events there was not any evidence to prove an authority in the partners of this concern, to draw such a bill of exchange as this. I very much doubt whether there is any authority in mining companies, arising by implication from the nature of their dealings (and it is to be observed, that there was no proof of any usage to do this in such companies) to draw bills of exchange. The argument would go to this, that all persons who deal in the produce of the land which they jointly occupy, because they might sell that produce at a distance, would have an implied power given to each other to draw bills of exchange for the purpose of receiving payment for it. If the argument was valid, it would shew that farmers acting in partnership, as well as miners, would have, as incidental to the relation of partners, an authority to draw bills of exchange

(*p*) See *Fox v. Clifton*, 6 Bingham, 776. *Nockells v. Crosby*, 3 B. & C. 814. *Bowne v. Freeth*, 9 B. & C. 632.

upon the persons to whom the produce of the land was sold."

The principles laid down in this case have been adhered to in many subsequent cases, which illustrate their application to varying circumstances.

Three cases will next be referred to, decided in the Court of Exchequer, arising out of the affairs of Wheal Trewolvas, a scrip mine.

The first of these is *Tredwen v. Bourne* (q). This was an action for goods supplied. It was proved that a prospectus had issued, stating the capital to be 30,000*l.*, in 3000 shares of 10*l.* each, of which 2000 only were disposed of. The defendant, who resided at Liverpool, took one hundred shares; there were directors, a secretary and other officers, and an office in London in which the business of the company was transacted; the goods were supplied by the order of the directors. There was no evidence of the defendant having been at the mine, or attended meetings of the company, but two letters were put in signed by him and several other shareholders, being requisitions to the directors to remove one of their body. The learned judge, Mr. Baron Rolfe, directed the jury, that if they were satisfied the defendant was a shareholder, and knew of the concern being carried on by the directors, and the parties in their employ *in the manner it was*, he was liable in this action. A rule nisi was obtained (in pursuance of leave), to enter a nonsuit, on the grounds that the defendant could not be liable as a shareholder, inasmuch as he assented only to become one in a company with a capital of 30,000*l.* in 3000 shares, and had not assented to its being carried on

with a less capital, and that, if a shareholder, he had not expressly or impliedly authorized the directors to pledge his credit. The first point was decided against him, on the ground that his letters furnished some evidence of his having assented to the smaller capital. On the second point, Lord *Abinger* remarks, "it is said that a mining company, which, as was decided in *Dickenson v. Valpy*, is not necessarily formed with the power to pledge the credit of individual members, by the drawing of bills, is also not formed with power to bind each other by dealing on credit; but these are two very different propositions. Whether the directors have such a power, must depend on the general nature of the concern." *Parke*, B., says, "The whole question was, whether there was evidence to go to the jury, that the defendant gave authority to the directors to pledge his credit to the plaintiff. If the case had stood solely on the fact of his being a shareholder, I should have thought it was not sufficient. But his letters, which were put in shewed, 1st, that he knew the directors were acting in the management of the partnership; and, 2dly, that he was taking a personal interest in the concern: and they were evidence for the jury, that he authorized the directors to do what they did for his benefit. It is said that he was deceived as to the amount of capital; but whether he knew the amount actually subscribed or not, there was proof that he authorized the directors to proceed in the management of the concern. Either he knew it, or, not knowing it, chose to authorize the directors to proceed. No point was made at the trial, that such a partnership as this could not deal on credit: if it had, the plaintiff would probably have supplied the evidence

on that point, and a Cornish jury would probably have said it was the constant practice to purchase materials for mines on credit ; at all events the objection was not taken."

It will be observed, that the distinction taken by Lord *Tenterden* in *Vice v. Lady Anson*, between mining partnerships and trading partnerships, on the ground that a mining partnership *was an interest in land*, and therefore "only transferable with the formalities with which an interest in land is transferable," was scarcely noticed in this case. *Vice v. Lady Anson* was indeed quoted in the argument for the defendant, but was met by the observation of Mr. Baron *Parke*, "a mining concern is a trading concern;" and it seems to have been assumed throughout the case, that a share in a mine is not necessarily so far an interest in the realty as to require any other method of transfer than that usually valid with reference to shares in joint stock companies, at least so far as to render the shareholder liable to the creditors of the concern.

It appears, indeed, that a question should have been submitted to the jury, in accordance with the law as laid down in *Dickenson v. Valpy*, which was not submitted to them, *viz.*, "whether it was usual or necessary for the directors of such a company to obtain goods on credit." There was indeed no proof, as far as appears, of such a practice having been *usual* in other mines; the nature of the concern, however, afforded ample evidence from which the jury might have implied the *necessity* of it. And had they found that it was necessary, it would appear that no difficulty could have arisen. As it was, the Court seem to have thought this omission not of sufficient importance to

disturb the verdict, the counsel for the defendant not having insisted on the question being put to the jury, probably in the belief (which the Court seem to have entertained), that they could have expressed but one opinion about it, and because the letters of the defendant furnished evidence of direct authority. In this view this case is strictly reconcilable, and in accordance with *Dickenson v. Valpy*, though, perhaps, somewhat at variance with *Vice v. Lady Anson*.

The next case is *Hawtayne v. Bourne* (r), where the public officer of a banking company brought an action against the same defendant for *money lent*, under these circumstances. It appeared that the directors of Trewolvas Mine had appointed a resident agent to manage the mine, and that the agent not having sufficient funds of the company to pay the labourers, a great number of them obtained distress warrants upon the materials of the mine to satisfy their arrears of wages; but in order to prevent the materials being distrained, the agent applied to the banking company for a loan of money on behalf of the company without any express authority from the shareholders, which was obtained and applied to the payment of the labourers' wages, and was the sum sought to be recovered. There was some evidence of conversations between the agent and the defendant, which, however, was not submitted to the jury. *Maule, J.*, before whom the cause was tried, in summing up stated to the jury, that although under ordinary circumstances an agent could not, without express authority, borrow money in the name of his principal, so as to bind him, yet if it became absolutely necessary to raise money in order to preserve the pro-

perty of the principal, the law would imply an authority to the agent to do so to the extent of that necessity ; and he left it to the jury to say whether the pressure on the concern was such as to render the advance of this money a case of such necessity. The jury found for the plaintiff. On the argument of a rule which had been obtained for a new trial, on the ground of misdirection, it was contended that the power of the agent, under these circumstances, was analogous to that of the master of a ship, who has an implied authority to borrow money for the necessary use of the ship, upon the credit of the owner. The Court, however, made the rule for a new trial absolute, without hearing counsel in support of it.

Mr. Baron *Parke* said (s):—

“ This is an action brought by the plaintiffs, who are bankers, to recover from the defendant, as one of the proprietors of the Trewolvas Mine, a mine carried on in the ordinary way, the balance of a sum of £400, advanced by them to the agent appointed by the company of proprietors for the management of the mine. Now the extent of the authority conferred upon the agent by his appointment was this only—that he should conduct and carry on the affairs of the mine in the usual manner ; there is no proof of express authority to borrow money from bankers for that purpose, or that it was necessary in the ordinary course of the undertaking ; and certainly no such authority could be assumed. There are two grounds on which it is said the defendant may be made responsible ; first, on that of a special authority given to the agent to borrow money ; and secondly, on the assumed principle, that

every owner who appoints an agent for the management of his property, must be taken to have given him authority to borrow money in cases of absolute necessity. There certainly was, in the present case, some evidence from which a jury might have inferred that a power to borrow money for the purposes of the mine had been expressly given to the agent; but that evidence does not appear to have been left to the jury, and therefore the verdict cannot be supported on the first ground. Then as to the second ground, it appears that the learned Judge told the jury, that they might infer an authority in the agent, not only to conduct the general business of the mine, but also in cases of necessity to raise money for that purpose. I am not aware that any authority is to be found in our law to support this proposition. No such power exists, except in the cases alluded to in the argument, of the master of a ship, and of the acceptor of a bill of exchange for the honour of the drawer.

“The latter derives its existence from the law of merchants: and in the former case the law, which generally provides for ordinary events, and not for cases which are of rare occurrence, considers how likely and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, to provide the means of continuing the voyage, to pledge the credit of her owners: and therefore (t) it is that the law invests the master with the power to raise

(t) It may be added that one condition of the existence of this authority, is the severance of communication between the master and the owners—if the means of communication be open (as they were between the agent and directors) he has no authority to borrow. *Lister v. Baxter*, 2 Strange, 695. See the *Rhadamanthe*, 1 Dods. 201. *The Barbara*, 4 Rob. A. R. 1. *La Ysabel*, 1 Dods. 273.

money, and by an instrument of hypothecation, to pledge the ship itself, if necessary. If that case be analogous to this, it follows that the agent had power, not only to borrow money, but, in the event of security being required, to mortgage the mine itself. The authority of the master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent. I am, therefore, of opinion, that the agent of the mine had not the authority contended for—*whether he had or not was a question for the jury*: but on the general principles of law, it seems to me that the ruling of the learned Judge cannot be supported, and that the rule for a new trial must be made absolute.”

In this case, it will be observed, no question was raised as to the transferability of an interest in a mine, and it may be assumed that the evidence was the same as in the previous case. It establishes a broad distinction, subsequently recognised by the Court of Common Pleas, between the power to pledge the credit of a company for materials, and to borrow money. In *Tredwen v. Bourne*, it was held, that the mere constitution of such a company was evidence of its being necessary and usual for it to deal on credit by means of an agent (for it will be seen by subsequent cases (†) that although the order for goods supplied was there given by directors, the law would have been the same if it had been given by an agent); but was not any evidence of its being necessary or usual for such agent to borrow money. Mr. Baron *Parke*, indeed, says, that the extent of the agent's authority was matter for the jury, which must be taken to mean, if there had

(†) See dictum of *Parke*, B., in *Hawken v. Bourne*, *post*, p. 112.

been any evidence of the authority contended for, either direct (of which there seems to have been some) or implied, of which the Court seem clearly to have been of opinion that there was none. The Court, indeed, took upon themselves to decide that the mere constitution of such a company is no evidence whatever of such an implied authority: it is apprehended, however, that evidence (if there had been such) of its *being usual for the agents of such companies to borrow money* would have been admissible, and that a verdict found upon such evidence would have been supported. The distinction too should be borne in mind between general necessity and usage, which is admissible as evidence of authority, and a particular necessity or act, which is not.

The next case of *Hawken v. Bourne* (u), decided that the extent of the authority proved by such general evidence, cannot be limited (though it may be increased) by any arrangement which does not come to the notice of the creditor. This was another action for work and materials, in which, on behalf of the defendant, a prospectus issued on the formation of the company was put in, stating that all supplies for the mine were to be furnished at cash prices, and it was shewn that the scrip certificates bore an indorsement to that effect. In this, as in the previous cases, there was evidence of the plaintiff's having known that the defendant was a shareholder. The learned Judge, Mr. Justice *Maule*, told the jury "that he thought that the mine being worked with the knowledge and for the benefit of the defendant, he was liable on contracts entered into for articles ordered in the usual way of

(u) 8 M. & W. 703.

conducting such concerns on behalf of the owners, unless the party ordering them was in fact not authorized by the defendant, and the plaintiff had notice of that fact. The plaintiff had a verdict, and the Court held the direction of the learned Judge to be right. In the course of the judgment, it is said, "any restriction which by agreement amongst the partners is attempted to be imposed upon the authority which one possesses as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restriction has been made. In the present case, therefore, the acting directors had power to bind the defendant by contracts made by themselves, if made in the usual way of conducting such a concern, as well as by those made by a purser, if it was the usual mode to act by the intervention of such an agent."

In the same year (1841), in which *Hawken v. Bourne* was decided, the case of *Steinberger v. Carr* (*w*), came before the Court of Common Pleas, in which the mode in which an interest could be obtained in a mine was discussed. It was an action against a shareholder in a joint stock company for working mines in the Brazils, and evidence having been given that by the law of Brazil mines were usually transferred by *deed*, it was objected, on the authority of *Vice v. Lady Anson*, that no conveyance by deed to the defendant was proved (*x*). *Tindal*, C. J., however, said, "The question is, whe-

(*w*) 3 Scott's New Rep. 406.

(*x*) There was also a question on the improper division of shares, it was held, however, that there was evidence for the jury of the defendant having assented to what had been done.

ther or not the defendant is liable as a partner in a trading concern . . . with respect to *Vice v. Lady Anson*, I cannot think its doctrine will ever be extended; and certainly none of the subsequent cases place much reliance upon it." *Maule, J.*, observes, "If *Vice v. Lady Anson* is to be considered as having decided that no shareholder in a mining company can be liable for the debts of the concern, unless he take a legal interest in the mine, undoubtedly it could not be supported. But it seems to me that case has been unfairly dealt with. The defendant there was sought to be charged upon the single ground that she was an owner of the mines, and the proof of ownership failed" (y). This case was decided on the ground that a deed in Brazil might mean an instrument not under seal, and has been only quoted for the purpose of shewing the light in which *Vice v. Lady Anson* was regarded by the Court. In the same year, two cases, *Ralph v. Harvey* and *Richards v. Harvey* (z), came before the Court of Queen's Bench. They were actions for goods supplied, tried before the deputy sheriff of Devon. The mine seems, as far as can be collected from the report, to have been a cost-book mine. There was no proof of any deed of settlement or partnership, of the existence of directors, or the issuing of shares, nor was it shewn that the defendant had personally interfered with the carrying on of the mine, or that the plaintiff had supplied the goods on his credit. The only evidence by which the plaintiff endeavoured to shew the defendant to be a partner

(y) It should be remembered, however, that the plaintiff relied also on *Lady Anson* being a partner, and sharing the profits of the mine. See the argument of Sir F. Pollock.

(z) 1 Q. B. 845.

was that of admissions in conversations. He was stated to have said, in *Ralph v. Harvey*, after the work in question had been done, that he held one hundred shares, that he would see the manager, and that arrangements should be made for payment. *Vice v. Lady Anson* was cited for the defendant, and *Tredwen v. Bourne* for the plaintiff. Some evidence was given for the defendant, to shew that he had never actually become entitled to shares in the mine. There was a verdict for the defendant. The summing up of the deputy sheriff was stated somewhat differently in the affidavits on behalf of the plaintiff and defendant—the attorney for the plaintiff representing him to have told the jury that *Vice v. Lady Anson* was still law and not overruled by *Tredwen v. Bourne*: that no deed of co-partnership being proved by the plaintiff, there was no co-partnership, and very meagre evidence indeed, beyond admissions, of the defendant being a shareholder. The affidavit of the attorney for the defendant stated the direction to have been, that if the defendant was a shareholder before, or at the time when the work was done, he was liable, or if he held himself out to the world as such; that the jury had to consider whether he was a shareholder or not: that the evidence to prove him a shareholder was extremely meagre, and the deputy sheriff did not think the admissions they had heard to the two or three persons who had been examined were to be taken as evidence sufficient to prove the defendant a shareholder: and that he considered the case of *Vice v. Lady Anson*, still to be law.

In *Richards v. Harvey*, in which the evidence was substantially the same, and the verdict also for the

defendant, the affidavit in behalf of the plaintiff, stated that the deputy sheriff summed up the case, and directed the jury, upon the authority of *Vice v. Lady Anson*, that there was no evidence to shew that the defendant was a shareholder: and he held that, if the admissions had been made before the mine stopped, and at a time when it was working, the plaintiff could have recovered; but, as they were made after the mine stopped, they had no weight. The affidavit on behalf of the defendant, stated that the sheriff had not said that there was no evidence of defendant being a shareholder, but had left it to the jury to decide whether or not he was a shareholder, or had held himself out to the world as such, saying, that if he had done so while the mine was working, he must be presumed to have had sufficient interest to make him a partner; and that, after reading over the evidence, the deputy sheriff told the jury, that if the defendant had given any authority or direction, he should have recommended them to find a verdict for the plaintiff, as it was he left it in their hands. On rules having been obtained for new trials on the ground of misdirection, Lord Denman, C. J. said, "The rules must be absolute—the deputy sheriff laid too much stress on the necessity of proving a partnership deed—without that proof it might have been shewn that the defendant had made such declarations as would render him liable. And in *Richards v. Harvey*, it was a mistake to say that the declarations could not affect the defendant, unless they had been made while the work was proceeding: though if they had been made then, their effect would have been stronger. But if uttered at any time, they might be evidence for the jury." *Patteson, J.*, "I am of the

same opinion. If the admission after the work was done, in *Richards v. Harvey*, had amounted to no more than that the defendant was then a shareholder, and the deputy sheriff had pointed that out to the jury, the case would have been different."

The next and last reported case immediately bearing upon this subject, is that of *Ricketts v. Bennett (a)*, tried at the Cornwall Summer Assizes in 1846. The action was brought by the Messrs. Ricketts, bankers, of Penzance, against two adventurers in a mine called Wheal Providence, to recover the sum of £3,618, the balance of a banking account; the facts are recapitulated in the elaborate judgment of the Court of Common Pleas, pronounced by *Wilde*, C. J., which is quoted at length.

"This was a motion for a new trial, on the ground of misdirection, and of the verdict being against evidence—the facts of the case appear to be, that A. Robinson and his Son, were the owners of ninety-nine shares in the mines, the defendants of a small number, four or five each. A. Robinson, though not the purser of the mine, assumed the control of the management, and continued doing so from the time of the purchase of his shares to the closing of the banker's account. During this time he opened an account with the plaintiffs, who were bankers. He had a private account of his own at the bank, but he opened the account in question in the name of the adventurers. That account opens with borrowing £280, to pay the Helston Bank a private account of Robinson and Son. At the time of opening this account, he communicates with the manager of the bank that loans will be re-

(a) 17 L. J., C. 17; 4 C. B. 686.

quired, and that, as they will be large, he is only to pay £4 per cent. interest upon them. It is then afterwards stated in evidence, that because they are so large, the interest was increased to £5 per cent. Money is advanced to Robinson to pay the dividends; but he does not at the time draw out the amount of his own dividend, but afterwards draws various sums, which he states in his evidence were for his dividend. The bank pay his checks, and in the result the account is overdrawn to the amount claimed. The defendants received certain sums as dividends; but there was no notice to them that the payment was made out of borrowed money, nor that there was such an account as that in question at the bank: and when the fact is first communicated to them, they say that they had no notice. The plaintiffs' case was not very distinctly put at the trial, nor in the argument before us: it was not stated whether the plaintiffs insisted that the defendants were liable simply as being shareholders, or as being shareholders and partners with the manager. It is, however, material to distinguish between the two, and the only difficulty arises from the distinction not having been taken. First, then, as to the misdirection. The Judge told the jury, that the defendants were not liable simply as co-adventurers, and independently of all other circumstances, for money borrowed by a co-adventurer. This is a distinct point. The ruling, however, is not simply this, because the Judge says, 'there may be an express authority, or one that is implied, arising from the other adventurer being the manager of the concern; and he then left it to the jury to say whether, by reason of Robinson being the manager, there was any implied authority. The misdirection applies only to the first

part. What authority then is there for holding that there was a misdirection? In general trading concerns, all partners are supposed to be equally in the management of the concern, and an authority to bind the co-partners to a very large extent is therefore implied. But, is that so as to co-adventurers? By no means. It is well known that the fact is contrary, and that only certain individuals have the management. If, as a principle of law, one co-adventurer had the power, independently of management, to bind his co-adventurers, would it not be inconsistent with the carrying on of the mine? It can only be in consequence of having the management; and, if so, the authority results from the management, and not from being a co-adventurer. Any express authority was in the present case negatived by the evidence of Robinson. Every case that has been decided shews, when examined, that the ruling of the Judge on the present occasion was correct. In *Dickinson v. Valpy* (b), the question was, whether a co-adventurer was liable upon a bill of exchange, drawn and accepted by the directors of a mining company. How did the Court treat the question? Lord *Tenterden* says, "I am of opinion, that the mere circumstance of the defendant having become a shareholder in a mining company does not, in point of law, make him answerable for bills drawn and accepted by those who took upon themselves to manage the concern." And *Bayley, J.*, says, "in order to establish his liability, it ought to have been made out affirmatively, on the part of the plaintiff, that this was a company in which the directors were authorized to bind the other members by drawing and

(b) 10 B. & C. 128.

accepting bills. Now, upon that point, the only question which could be submitted to the jury was, whether companies instituted for similar purposes had constantly been in the habit of drawing and accepting bills; or whether it was absolutely necessary, for the purpose of carrying on the concern, that there should have been such a power. There was no evidence to warrant the Judge in leaving those questions to the jury. First, there was no evidence for them that such a power was actually vested in the directors of other companies, or that it was necessary for the purpose of carrying on such a concern. I think that such a power is *not* necessary for that purpose," and then he says, "The directors may bind themselves personally, and pledge their own responsibility, but not that of the other members." And *Littledale, J.*, says, "In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another, by drawing and accepting bills, because the drawing and accepting of bills is necessary for the purpose of carrying on a trading partnership; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company." And the judgment of *Parke, B.* is to the same effect; the result of the whole being, that in a partnership for the working of mines only, such authority will be implied by law in a co-adventurer as is usual and necessary for the purpose of carrying on the concern. The next case is that of *Tredwen v. Bourne (c)*, where goods were supplied on credit for the use of the mine, by order of the directors. The Judge there left it to the jury with the direction, that if they were satisfied the defendant was a shareholder,

(c) 6 M. & W. 461. 9 L. J., Ex 290.

and knew of the concern being carried on by the directors and the parties in their employ in the manner in which it was, he was liable in the action. I find there that Mr. Crowder stated, "the business of a mine is carried on quite differently from that of an ordinary trading firm; regular calls are made as money is wanted for the purpose of the partnership, which are paid down; and the directors have only authority to manage the concern with the funds so supplied, but not to pledge the credit of individual shareholders;" I believe with respect to a cost-book mine, the statement is quite correct. *Parke, B.*, there says, "The directors have authority to do all that is usual to do in the management of mining companies." There is nothing in that case inconsistent with the ruling now complained of, and *Parke, B.*, in his judgment says, "If the case had merely stood on the fact of his being a shareholder, I should have thought it was not sufficient;" just what was said in this case. That case, therefore, is a distinct authority in favour of the present ruling. The next case of importance is *Hawtayne v. Bourne (d)*. There a debt was incurred by the agent of the mine for the payment of wages due to the labourers in the mine, and who had obtained warrants of distress upon the materials. The consequence of such a seizure would in all probability have been, that the mine would have been filled with water, and very great expense incurred in afterwards clearing it. My brother *Maule* there left it to the jury, "that although under ordinary circumstances an agent could not, without express authority, borrow money in the name of his principal, so as to bind him, yet, if it became

absolutely necessary to raise money, in order to preserve the property of the principal, the law would imply an authority in the agent to do so, to the extent of that necessity : and he left it to the jury to say whether the pressure upon the concern was such as to render the advance of this money a case of such necessity," and the jury found that there was such a necessity. The Court of Exchequer, however, granted a new trial, saying that this was not within the ordinary authority of an agent, and that such an authority was not to be inferred. We have therefore the opinion of the Court of Exchequer, that it is not a sudden necessity that will give an agent authority to borrow money : and nothing appears in that case to sanction the doctrine, that any such authority is to be implied from the simple fact of being a co-adventurer. The next case is *Hawken v. Bourne*(e), where the defendant had proved the restraint and limitation as to incurring liabilities, which it was supposed, from an *obiter dictum* in *Tredwen v. Bourne*, would constitute a defence ; and the case shews how much less authority is to be given to an *obiter dictum* than to a judgment on a point necessary to be determined. The Court there said, that any restriction by agreement amongst the partners does not limit the authority as to third persons, unless they know that such restriction has been made. That case also distinctly recognises the position, that in looking to the liabilities of the members of a mining company, regard must be had to what is usual. In the present case there was no evidence of what was usual, and I do not indeed see how it could have been given. It is enough, therefore, to say that the defendants were

(e) 8 M. & W. 703 ; 8 L. J., Ex. 361.

co-adventurers with Robinson, and that Robinson, without authority from them, opened an account at the bank. The Judge rightly ruled that they were in no way liable for the acts of Robinson; and the ruling must have been the same, if the conduct of Robinson had been as candid and correct, as from the facts it is open to the suspicion of fraud. I think the whole case was fully before the jury, and there was nothing to warrant them in coming to a different conclusion from that to which they arrived, and their decision appears to me to have been a correct one. The question was not so put to the jury: but I think there was a strong case that the plaintiffs dealt on the individual credit of Robinson." Rule discharged.

This important case concludes the list of decisions on the authority of adventurers and managers to pledge the credit of mining shareholders to the public. It must be considered, however, as chiefly, if not exclusively applicable to cost-book mines, scrip mines (as they are called) being regulated by the statutes and decisions which apply to joint stock companies.

This case is in fact but a corollary to *Hawtayne v. Bourne*, and could not have been decided otherwise without overruling it. For if the agent,—and in that case, although the mine was in the nature of a joint stock company, the directors (*f*) appeared to have delegated their powers to an agent or purser (before the Joint Stock Companies' Act),—had not power to borrow money for the purpose of preventing a distress of the machinery, the consequence of which would

(*f*) As to the power of directors to draw bills, *Fox v. Frith*, 10 M. & W. 131.

have been probably a flooding of the mine with water, and other damage reparable only at great expense, *a fortiori*, had not the agent such power when no emergency existed. The decision of *Ricketts v. Bennett* is, however, valuable, as throwing additional light on the powers of partners and co-adventurers, and as discussing for the first time, with reference to this subject, the different relations among co-adventurers which the appointment of a *manager* creates. "In general trading concerns, all partners are supposed to be equally in the management in the concern; and an authority to bind the co-partners to a very large extent is therefore implied. But is that so as to *co-adventurers*? By no means. It is well known that the fact is contrary, and that only certain individuals have the *management*, and if so, the authority results from the management (*g*), and not from being a co-adventurer." The only point, indeed, expressly decided by the case is this: that as matter of law, a mere adventurer in a cost-book mine has no authority to borrow money for the purposes of the mine on behalf of his co-adventurers. In other words, that the nature and constitution of a cost-book mine affords *no evidence* to be left to the jury of its being necessary or usual for a mere adventurer to possess such authority. It is intimated, however, that the appointment of one adventurer (or, it is submitted, of any other person), to the *management* of the concern may confer greater authority upon him than that of a mere adventurer, and that the extent of such authority becomes a question for the jury, whether

(*g*) As to the difference of liability of provisional committeemen created by appointment of *managing* committee, see *Dawson v. Morrison*, 16 L. J., C. P. 240.

proved by direct evidence, such as the terms of the appointment, or resolutions of the shareholders, or indirect, such as the constitution and nature of the company, or the customary mode of conducting similar companies: and the finding of the jury in this case, in which the latter description only of evidence was offered, is what the finding of any other Cornish jury might be expected to be in every case of the sort which came before them. Should, indeed, evidence be produced of its being usual for the agent to be entrusted with the power of borrowing money in a similar case, the result may be different, but it is believed that no such evidence is producible, there being no such custom. A question, however, arises, well worthy of consideration, whether, if the appointment of an agent by the adventurers gives that agent greater powers than were possessed by any one of them, or even if it be a mere delegation to him of such as each possessed, it does not to some extent diminish those powers? Assuming each adventurer to have *primâ facie* the power of binding his co-adventurers for necessities, &c., purchased on credit, it is submitted that he no longer retains that power to its full extent, after having agreed that it shall be exercised by one person for all; and that a tradesman who trusted a shareholder not in the actual or ostensible management of the mine, merely on the ground of his being a shareholder, would be confined to his remedy against that shareholder; and that the shareholder, if compelled, as he might be, to pay such creditor, would have no remedy in equity against his co-shareholders, at least unless they had availed themselves of the benefit of his contract. Before dismissing this case from consideration, a dictum of *Wilde*, C. J., should be alluded to, not indeed necessary to the deci-

sion of the case, and to which the remarks which he himself makes relative to the value of *obiter dicta* are applicable. Alluding to the case of *Tredwen v. Bourne*, he says,—“ I find there that Mr. Crowder stated, ‘ the business of a mine is carried on quite differently from that of an ordinary trading firm : regular calls are made as money is wanted for the purpose of the partnership, which are paid down ; and the directors have only authority to manage the concern with the funds so supplied, but not to pledge the credit of individual shareholders.’ *I believe, with respect to a cost-book mine, the statement is quite correct.*” If the statement be correct, the purser of a cost-book mine orders every cart load of timber which he has not funds in hand to pay for entirely on his own risk, and the merchant supplies it on his credit only. Is it apprehended that it would be easy to prove the custom on the part of cost-book mines as well as others, *to order necessary materials on credit* ; and, according to all the cases, evidence of such a custom would be admissible. Moreover, the cases of *Ralph v. Harvey* and *Richards v. Harvey* (i), which were not referred to in the argument on either side or the judgment in *Ricketts v. Bennett*, seem to have been decided with reference to a cost-book mine, and if so, establish the liability of a shareholder for goods supplied to the mine without his knowledge or authority.

The result of the foregoing cases may perhaps be thus shortly stated:—That a mining company is a trading partnership, a share of which may be acquired without such a conveyance as is necessary to pass an interest in land ; that it differs from ordinary trading partnerships in not being founded on the *delectus personarum*, a difference

(i) *Ante*, p. 113.

which limits the powers of mining partners ; that the mere constitution of such a company is no evidence of an implied authority from one partner to another to pledge his credit by drawing bills of exchange, or borrowing money, even on the greatest emergency ; that such constitution is, however, evidence for the jury of authority to order necessities on credit ; that wherever there is any question for the jury of implied authority, either to a mere partner or to a manager, the proper direction to them is to consider whether it be proved that such authority is *necessary* to the carrying on of the concern, or *usual* in similar concerns.

Sect. 6. While the Courts of Common Law have from time to time considered the nature of property in mines, the modes of transferring it, and the liabilities of shareholders to creditors, numerous cases have come before the Courts of Equity, by which the relations of shareholders to each other, and their general duties have been defined.

In the case of *Crawshay v. Maule* (j), Lord Eldon said with reference to an iron mine, " It seems difficult to establish that this is an interest in land distinct from a partnership in trade : a mere interest in land in which a partition could take place : for when persons, having purchased such an interest, manufacture and bring to market the produce of the land, as one common fund, to be sold for their common benefit, it may be contended that they have entered into an agreement, which gives to that interest the nature, and subjects it to the doctrines of a partnership in trade."

Mining partnerships have been uniformly considered in equity trading partnerships, as distinguished from

(j) 1 Swanst. 523.

a mere joint interest in land and its productions, notwithstanding the realty being, as it were, the foundation of their operations (*j*). It has been held that a bill will lie for an account of the profits of a mine (*k*), although it will not lie for an account of the rents and profits of a real estate. Lord *Hardwicke* was of opinion, and that opinion has been acted upon by Lord *Brougham* (*l*), that an account may be decreed of the profits of a mine, though no injunction lies to restrain the working of it: a doctrine which distinguishes the case of mines from that of timber and other things connected with the realty, in which an injunction is inseparable from an account. So also it has been held, that the rules which regulate the practice of opening biddings upon a sale of a landed estate, do not apply when a colliery is the subject of sale (*m*); and a receiver has been appointed of mines in which several persons were interested, on the ground of a mining concern being a species of trade, and not a mere tenancy in common of land (*m*).

The principal distinctions which have been adverted to between mining companies and ordinary trading partnerships have been also recognised by Courts of Equity. Their differences as well as their resemblances are nowhere more clearly pointed out than in the judgment of Sir *John Leach*, in the case of *Fereday v.*

(*j*) 1 Swanst. 518.

(*k*) *Williams v. Attenborough*, Turn. & Russ. 73. See *Story v. Lord Windeatt*, 2 Atk. 630. *Bishop of Winchester v. Knight*, P. Wms. 406; *Collyer on Partnership*, 2nd edit. 783; *Jarman on Conveyancing* (Sweet's edit.), vol. 4, p. 662.

(*l*) *Parrott v. Palmer*, 3 Myl. & K. 632; *Collyer on Partnership*, 783. *Williams v. Attenborough*, Turn. & Russ. 70.

(*m*) *Jefferys v. Smith*, 1 Jac. & Walk. 298.

Wightwick (n). On a bill having been filed by partners in a mining concern, praying that the partnership property might be sold, and the partnership accounts taken, and that it might be declared that the shares of a partner who had become bankrupt ought, in the first place, to be applied to repaying to the partnership the debt which he had incurred in the management of the concern; Sir *John Leach* said, "A lease was taken of certain mines, the lessees consisting of six persons; at the same time a lease was taken of the surface of the property. The mines and surface were used with a communion of expense, and a communion of profit. The first question is, whether this is partnership property, liable to be sold and disposed of to pay the partnership debts; and whether a partner having sold part of his share, his interest is to be considered subject, in the first place, to repayment of what is due from him to the partnership. This question is concluded by authority, but I am willing to decide it upon principle. Mining concerns are to some purposes trading concerns, but they are not so to all: they are not so in this particular, viz., that they are not, as an ordinary partnership trade, subject to dissolution on the death or bankruptcy of any of the partners, and the shares are transferable without the consent of the partners. In these particular instances, they have not all the incidents of a trading concern: in other respects it has been repeatedly held that they have—now it is a universal principle in regard to all property, whether real or personal, acquired for the purpose of a partnership, that property so acquired is upon the dissolution

(n) 1 Russ. & Myl. 45; Toml. 250.

of the partnership, subject to sale and accounts between the partners, and to payment of the partnership debts—that is an universal principle. To apply the rule to this particular case, the property was acquired by these partners for the purposes of the partnership concern. Therefore, though in the nature of real property, it is subject to all the debts of the partnership, and subject to the debts of one of the partners incurred in the administration of the property. There can be no doubt, therefore, that the plaintiffs have a right to make this claim.”

It has been recognised by the Courts of Equity, that the nature of mining partnerships does not admit of all the partners being equally in the management of the concern (as in ordinary partnerships), nor, on the other hand, of their interests being apportioned, and each working on his own account; and if a manager be not appointed by consent, in some cases it will be referred to the Master to appoint one. Lord *Eldon* said (*o*):—

“In my country, where there are frequently twenty owners of the same mine, if each is to have a set of miners coming down the shaft to work his twentieth part, it would be impossible to continue working the mine: must not a contract be implied that it is to be carried on in a practicable and feasible way? I believe I have a note of a case before Lord *Hardwicke*, which confirms me in the idea, that where there are part-owners of a mine, and they cannot by contract agree to appoint a manager, the Court will manage it for them.” And the case was subsequently decided in conformity with this view. Where it be necessary a dissolution, an account, and a receiver will be decre-

(*o*) *Jefferies v. Smith*, 1 Jac. & Walk. 302.

nor will the equities between the partners be affected by the absence of a good title to the shares in any of them, provided they acted as partners and *de facto* had a share in the management of the concern: accordingly in the same case, on its coming subsequently before the Master of the Rolls (*p*), it was held that a person who had agreed to purchase a share in a mine, and had afterwards successfully resisted the performance of the contract on the ground of defect of title, but who, in fact, acted as partner, and assigned the share, was liable to contribute to the partnership losses until he had so assigned his share, and given notice of it to his partners; that however his liability ceased on such assignment and notice, notwithstanding the insolvency of the assignee. It was held also, on the same principles, that the assignee, not having been acknowledged a partner or permitted to act, did not, by his acceptance of the assignment, incur any liability as between himself and his co-partners.

The Courts of Equity, however, will seldom listen to the prayer of a shareholder claiming their interference, if he have withheld his claim during adverse times, bringing it forward after others have incurred expense and risk in making the mine profitable (*q*).

It may be proper here to remark, that the Court of Chancery may take the accounts of a mining partnership on the bankruptcy of any one adventurer, without a dissolution of the partnership, but not so the Court of Bankruptcy, the jurisdiction of which to take accounts depends on the dissolution of the partnership by the bankruptcy, which we have seen does not occur

(*p*) *Jefferies v. Smith*, 3 Russ. 158.

(*q*) *Norway v. Rowe*, 19 Ves. 143.

in mining concerns (*r*). The rights of a mortgagee of shares have been held to be the same as those of an assignee to pray for an account of the dealings and transactions of a mining concern and for a receiver, and an injunction against further interference (*s*).

The rights and duties of mortgagees of mining shares are not always easy to determine, founded as they are upon the double relation of mortgagee to mortgagor, and partner to co-partner. This question was much considered in the case of *Rowe v. Wood* (*s*), where a mortgagee of certain shares of a mine had assumed the management of the mine, and a motion was made by the mortgagor for a receiver, on the ground of mismanagement: the Lord Chancellor said, as long as the mortgagee declared the debt unsatisfied, the Court would not interfere unless some clear and specific acts of mismanagement were pointed out, and intimated that the duties of a mortgagee so situated were to be considered with reference to his character both as mortgagee and partner; that, for example, as mortgagee, he could not be called upon to lay out large sums on speculative operations, which a partner might be justified in expending, and that, at the utmost, he was not bound to advance more than a prudent owner. That, however, the mortgagor was entitled to insist on regular accounts being kept of all receipts, payments, and transactions, to have access to such accounts, and share in the control of the mine (*t*).

Sect. 7. The winding up of all mining companies, cost-book or otherwise, formed after the 14th of August,

(*r*) Ex parte Broadbent, Mont. & Ayr. 635.

(*s*) 2 Jac. & Walk. 533.

(*t*) *Rowe v. Wood*, 2 Jac. & Walk. 553.

1848, is now regulated by the Joint Stock Companies' Winding-up Act (*u*) passed during the last session. The act has been recently decided not to apply to cost-book mines formed before that day, although it applies to all mines and concerns in the nature of joint stock companies, which were within the provisions of the two former Winding-up Acts (*v*), and of the Joint Stock Companies Registration Act (*w*). The case referred to is that of *Wyld v. The Wheal Lovell Company* (*x*), which came before the Lord Chancellor on a motion to discharge an order made by Vice Chancellor *Knight Bruce*. It appeared that Mr. Wyld was a shareholder in the Wheal Lovell Mining Company, established in 1845, the affairs of which were carried on under the cost-book system; that a difference had arisen between him and his co-adventurers in consequence of his desiring to relinquish his shares without paying his proportion of the expenses, whereupon they induced a creditor of the company to sue him for the price of goods supplied, and a verdict was obtained against him in the action. Mr. *Wyld* upon this served a notice upon the purser under the provisions of the Joint Stock Companies' Winding-up Act, stating that unless the debt and costs were paid or secured within ten days, he should present a petition for the dissolution and winding-up of the affairs of the association, and such payment not having been made, the petition was presented. The affidavits relative to the affairs of the company were somewhat conflicting, it did not dis-

(*u*) 11 & 12 Vict. c. 45.

(*v*) 7 & 8 Vict. c. 111; 8 & 9 Vict. c. 98.

(*w*) 7 & 8 Vict. c. 110.

(*x*) 18 Law J., ch. 139.

tinctly appear however, that the company was insolvent. The Vice Chancellor *Knight Bruce* made an order for the winding-up of the company, in the event of the debt and costs not being paid in a specified time, the amount due from Mr. Wyld for calls being deducted.

This order was discharged by the Lord Chancellor on the grounds, that the act did not apply to cost-book companies formed before the passing of it, and that if it did, the circumstances were not such as to justify the Court in making the order prayed for. As the judgment of the Lord Chancellor is one of great importance relative to the construction of an act which applies to a great number of existing mining companies, and to all hereafter formed, it is deemed proper to give the following extracts from it. After explaining at some length that the act was intended to apply only to companies unable to meet their engagements, he proceeds :—

“What are the facts, and do they prove what the act intended should be established before the discretion of the Court should be exercised for the purpose of bringing them within the operation of the act? Here is a quarrel between a shareholder and the company. The shareholder having bought certain shares, and having for some reason or other (whether good or bad is quite immaterial), declined to pay the future calls, the company says, ‘You must pay those calls.’ He says, ‘I will not pay those calls; I insist upon it I have a right to retire from the company without any obligation to pay the calls that have been made.’ That is the contest between the company and the shareholder. Now the shareholder, taking the statement from his own affidavit, considers that the action brought by the creditor was not brought by the creditor *bonâ fide*, for

his own purposes, to recover the debt which he claims against the company, but that he was set on by the company, or the officer of the company, for the purpose of indirectly compelling this shareholder to pay his calls, that is to say, to create a claim by him against the company, which they might set off against the calls which they demanded from him ; and according to his own representation, that was the reason why this action was brought against him. He takes the course which the act prescribes of giving notice to the company. As a matter of course, if that was their purpose, and the shareholder is right in supposing that was the object of the action, they did not regard that notice, because they intended the creditor should get judgment recovered against the shareholder, and then to tell him, 'we will not reimburse you without deducting the amount of the calls, and so obtaining payment of the calls by deducting them from the debt to which we are liable.' That was the course suggested. The terms of the act are complied with, because here is an action brought by a creditor of the company against a shareholder ; there is notice given by the shareholder to the company ; and so far, in point of fact, the test arises which the act intended should be considered a fair criterion of the position of the company. That is not what the act intended : the act intended all this transaction as a test of insolvency and a proof of incapacity to meet their engagements. The transaction here does not prove it at all ; the whole machinery is adapted for a totally different purpose, and has no reference whatever to the capacity or incapacity of the company to pay their debts ; and that I have, not from the statement of the company, but from the statement of the shareholder who represents that, making it a ground of

complaint against the company, it is true; but by doing so he keeps them out of the operation of the act, which he has endeavoured to enforce.

“ There being two grounds, either of which would be sufficient foundation for the order I make, I thought it right for the parties to be aware that on both grounds I am of opinion that this is not a case in which it is right to make any order. And I cannot but think it is an error to use this act for the purpose of settling controverted points between the shareholders and the company: it was not intended for that purpose at all. The order uses it for that purpose, and decides that there is to be a set-off, and makes arrangements to settle the disputes between the shareholder and the company. There is no such object in the act; the object was on behalf of all creditors and shareholders, if a case appeared which would make it expedient that the affairs of the company should be wound up, to make arrangements for that purpose. That was the object of the statute; and to apply the machinery of this statute for the purpose of settling disputes about calls or shares, or payments by the shareholders of the company, appears to be a matter totally and entirely collateral to the object of the act, foreign from the purposes of the act, and one, therefore, which the Court would not use the machinery of the act for the purpose of carrying into effect. I think, therefore, the order of the Vice Chancellor must be discharged, and the petition before him dismissed.” (a)

(a) See the simple process by which the Stannaries Court winds up cost-book mines, in the next chapter. The reader is also referred to Appendix, p. 49, where the author has ventured to suggest the outlines of a proposed enactment, for extending the jurisdiction of the Stannaries Court to Devonshire, or establishing such a Court in that county, compelling the registration of cost-book mines, and exempting them from the operation of 11 & 12 Vict. c. 45.

CHAPTER IV.

OF THE STANNARIES COURT (*a*).

THE equities of the Cornish mining companies are now for the most part regulated by the Stannaries Court held at Truro, which possesses in many respects concurrent jurisdiction with the Courts of Chancery and Common Law. This Court was established by 6 & 7 Wm. 4, c. 106, which confirms to the Vice-warden appointed under it, the equitable jurisdiction possessed by the previous Vice-wardens, extending it from tin mines to all others in which any metallic mineral is raised, and consolidates the Courts of Common Law formerly held before the Stewards of the four Stannaries into one Court presided over by the Vice-warden, with a similar extension of jurisdiction: providing a right of appeal from any order, decree, or record of the Vice-warden's Court to the Lord Warden, aided by three or more members of the judicial committee of the privy council, and from thence to the House of Lords, with a proviso that no judgment on the verdict of a jury shall be reversed except for error apparent on the record.

Provision is made for compelling the attendance of witnesses from all parts of England and Wales, for the summoning of juries, the granting of new trials, and the enforcing judgments by issuing writs of execution

(*a*) The author is indebted for much information on this subject to a paper furnished by H. S. Stokes, Esq., to the Mining Almanac, 1849.

upon them from the superior Courts to all parts of the kingdom. Authority is given for making rules of the Stannaries Court rules of the superior Courts, and for removing causes by certiorari. The Vice-warden is empowered to make rules and orders concerning the practice of his Court (*a*), to order new trials, to send causes to be tried by the Judges of assize, to direct and try issues of fact arising on the equity side of his Court, and to order the sale of the shares of any person refusing to pay money for the working of a mine, which may have been ordered to be paid by a decree.

The jurisdiction is declared to comprehend the county of Cornwall, and there is a reservation in favour of all rights, privileges, customs, &c., before in force throughout the Stannaries.

This Court has been further regulated by stats. 2 & 3 Vict. c. 58, 7 & 8 Vict. c. 105, and 11 & 12 Vict. c. 83.

An inquiry into the original common law and equitable jurisdiction of the Stannaries would open a wide field for discussion, more interesting to the antiquary, than to the practical lawyer.

It may be sufficient here to say, that the common law jurisdiction of the Stannaries Court appears to be of very high antiquity, confirmed rather than created by Charters 3 John (*b*), and 33 Edw. 1 (*c*), and recog-

(*a*) See Appendix, p. xxxiv.

(*b*) This charter clearly recognises the *ancient customs* of tinners. "Quod possint, (i. e. Stannatores nostri) omni tempore libere et quiete absque alicujus hominis vexatione fodere Stammum et turbas ad Stammum fundendum ubique in moris et in feodis Episcoporum, et Abbatum, et Comitum, sicut solebant et consueverunt, et emere buscam ad funturam stammi sine vasto in regardis forestarum, et divertere aquas ad operationem eorum in Stammariis, sicut de antiquâ consuetudine consueverunt."

(*c*) "Quod omnes Stannatores prædicti operantes in Stannariis illis

nised and defined by many subsequent charters, statutes, and convocations of tinnern.

The working tinnern were taken under the peculiar protection of the Crown, under the appellation of "*Stannatores nostri*," and seem to have been at one time exempted from all other jurisdiction than that of the Stannary Courts, "except pleas of life land and member" (*d*), and the Warden was empowered to hold all pleas, not only between tinner and tinner, but concerning trespasses, plaints, and contracts, done or made in places worked in by tinnern within the Stannaries. Mr. *Smirke* observes that a criminal jurisdiction seems also to be implied in the language of the two most ancient charters. At present the common law jurisdiction of the Vice-warden is concurrent with that of the Superior Courts and the County Court, and it is understood that those who come under the description of miners, including adventurers, agents, labourers, merchants, and others who gain their livelihood principally by supplying materials, machinery, and other articles

quæ sunt dominica nostra dum operantur in eisdem Stannariis sint liberi et quieti de placitis natorum et de omnibus placitis et querelis curiam nostram et heredum nostrorum quoquo modo tangentibus, ita quod non respondeant coram aliquibus justiciariis nel ministris nostris seu heredum nostrorum de aliquo placito seu querelâ infra predictas Stannarias emergente nisi coram custode nostro Stannariarumstrarum predictarum qui pro tempore fuerit, exceptis placitis terre et vite et membrorum: nec recedant ab operationibus suis per summonicionem alicujus ministrorum nostrorum seu heredum nostrorum nisi per summonicionem dicti custodis nostri . . . Et quod custos noster predictus vel ejus locum tenens teneat omnia placita inter Stannatores predictos emergentia et etiam inter ipsos et alios forinsecos de omnibus transgressionibus querelis et contractibus factis, in locis in quibus operantur infra Stannarias predictas similiter emergentia: et quod idem custos habeat plenam potestatem ad Stannarios predictos et alios forinsecos in hujusmodi placitis justiciandos et partibus justiciam faciendam prout justum et hactenus in Stannariis illis fuerit usitatum."

(*d*) See the last note.

necessary for the working of mines, may sue and be sued in almost all causes of action, except such as involve title to land.

The equitable jurisdiction of the Stannaries Court is by no means traceable to the same antiquity, or as clearly ascertained as the common law jurisdiction (*d*). It may be enough here to say, that it is not now regarded as a personal privilege of the tinner, but extends only to such causes of dispute as arise out of mining transactions. This equitable jurisdiction seems to be the most valuable function of the new Stannaries Court, and to operate chiefly on mines carried on under the cost-book system. The system under which these mines are conducted, and which it has been attempted to explain (*e*), is recognised, and in a great degree regulated and enforced by the Court. On the accounts being audited and passed at a general meeting, consisting of the majority of the shareholders, either in person or by proxy, and calls agreed upon, the right of the purser to enforce those calls, beset as it is with numerous difficulties in the Courts of Common Law, is enforceable by a simple process in Equity. He sues the defaulter by petition, service of which must be personal if he reside within the jurisdiction, but may be effected, if he reside out of it, by affixing copies of it and the summons accompanying it,

(*d*) On this subject, see 3 Blacks. Com. 80; 4 Co. Inst. 230. *Martin v. Marshall*, Hob. 63; 2 Roll. Abr. 266. 1. 20. *Perrott's case*, 26 & 27 Eliz.; 4 Inst. 87. *Earl of Derby's case*, 12 Co. 114. S. C. 4 Inst. 213. *Trelawny v. Williams*, 2 Vern. 483. *Hall v. Vivian*, Mr. Smirke's Rep. of Vice *v. Thomas*, 37. *Oppy v. Lord De Dunstanville*, *ibid.* 38; *Carew's Survey of Cornwall*, Book 1, p. 17, ed. 1769. See also stat. 22 Jac. 1, s. 21; 12 Car. 1, s. 18, and s. 31; 22 Geo. 2, art. 8, s. 3; 26 Geo. 2, s. 9.

(*e*) Ch. 3.

on the door of the account-house, or some other conspicuous place in the mine. If an answer be put in, the plaintiff establishes his case by producing the cost-book, proving the defendant to be a shareholder, and the signatures of the shareholders who have passed the accounts: on a decree for payment of the debt and costs being obtained, an order *nisi* issues for the sale of the shares of the defaulter, to be made absolute unless the sum be paid, and if the proceeds be insufficient to discharge it, the defendant may be imprisoned in the county gaol, if resident within the county. Petitions of this kind are, it is understood, very usual, and the mode of proceeding described obviates the difficulties which arise in a Court of Common Law of enforcing calls. Ordinarily the relation of partnership between the co-adventurers must be a fatal obstacle to the recovery of them, and it is only under peculiar circumstances, such as the manager not being a partner, and proof being available either by admissions or otherwise of an account stated between him and the defendant, or of money paid by him to the defendant's use, that such a proceeding can succeed. These difficulties have driven adventurers to the indirect, but not always inefficacious course of suing the defaulter in the name of a creditor of the concern.

Another frequent mode of interference of the Equity side of the Vice-warden's Court, is in the nature of a proceeding towards making the mining company bankrupt, founded also on the ancient customs of the county. By one of those customs, every creditor of the concern, whether for services performed or goods supplied, has an equitable lien on the produce, machinery, and effects of the mine : and on the petition of a creditor

against the purser, the Vice-Warden will, on sufficient proof, order payment of the amount claimed, with costs of suit at a specified time; and on default at such time will make an order—first, to shew cause, then absolute, for the sale of the ores, halvans, engines, machinery, materials and effects of the mine, under the direction of the registrar, and the distribution of the proceeds equally among the creditors.

Another suit peculiar to this Court is the petition frequently presented for the revocation of unexpired setts, where mines have ceased to be worked, or have been worked inefficiently.

It is, perhaps, matter of regret, that a jurisdiction so useful as that of the Stannaries Court, which has been thus imperfectly described, and for the published rules and regulations of which the reader is referred to the Appendix (a), should not be extended to Devonshire, or that a similar Court should not be established in that county.

(a) P. 34. See also App. p. xlix., where suggestions are made for an act of Parliament for (among other things), extending the jurisdiction of the Court.

CHAPTER V.

OF CRIMINAL OFFENCES RELATING TO MINES.

THE Stat. 7 & 8 Geo. 4, c. 20, s. 37, enacts, that if any person shall steal or sever, with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, vein, bed or vein thereof respectively, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

The following case (a) was decided with regard to larceny in mines. William Webb and John Moyle, were indicted for stealing 100lbs. weight of copper ore, the property of Stephen Davey and others. Stephen Davey and others were proved to be adventurers in a mine, and the prisoners to be *tributers*, and it was proved that the prisoners had removed ore from the heap of another set of tributers to their own, both heaps being in the mine. It was held that this was no larceny from the *adventurers*, because they were in possession of both heaps, and the ore had therefore never been taken from them.

This decision (it is believed) in a great measure, led to stat. 2 & 3 Vict. c. 58, for "the prosecution and

(a) R. v. Webb and Another, 1 Moo. C. C. 431.

punishment of frauds in mines, by idle and dishonest workmen removing or concealing ore, for the purpose of obtaining more wages than are of right due to them, and thereby defrauding the adventurers in, or proprietors of such mines, or the honest and industrious workmen therein" (a), which enacts (s. 10), "that if any person or persons employed in, or about any mine in the county of Cornwall, shall take, remove, or conceal the ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found, or being in such mine, with intent to defraud the proprietor or proprietors of, or any adventurer or adventurers in such mine, or any one or more of them respectively, or any workman or miner employed therein, then, and in every such case respectively, such person or persons so offending, shall be deemed and taken to be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny."

An indictment under this statute alleged, that William Trevenner, late, &c., and William Treleage, late, &c., being persons employed in a certain mine within the county of Cornwall, that is to say, in a certain mine called Carn Brea Mine, in the parish aforesaid, in the county aforesaid, on the 13th day of January, 1844, with force and arms, at the parish aforesaid, in the said county, 3000lbs. weight of copper ore, of the value of £15, the property of Joseph Lyle and others, *then and there being found*, then and there feloniously did take and remove, with intent then and there feloniously to defraud the said Joseph Lyle and others, the adventurers in the said mine, against the form of the statute, &c., and against the peace, &c.

(a) This offence is commonly called "kitting."

On its being objected in arrest of judgment, that the indictment contained no averment that the ore removed *was in the mine*, the words "then and there," referring to the venue, or the parish and county mentioned in the indictment, and not necessarily to the mine; *Cresswell, J.*, ruled that the objection was valid, and the judgment was arrested (*b*).

7 Wm. 4, and 1 Vict. c. 89, s. 1, enacts, that whosoever shall unlawfully and maliciously set fire to any mine of coal, or any cannel coal, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

7 Geo. 4, c. 30, s. 7, enacts, that if any person shall unlawfully and maliciously pull down and destroy, or damage with intent to destroy, or to render useless, any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection, used in conducting the business of any mine, or any bridge, waggon way, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggon way, or trunk, be completed, or in an unfinished state, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned.

7 & 8 Geo. 4, c. 30, s. 8, enacts, that if any persons riotously and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force demolish, or pull down, or destroy, or begin

(*b*) *B. v. Trevenner and Another*, 2 Mood. & Rob. 477.

to demolish, pull down, or destroy, any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded ; or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed, or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine, or other engine for sinking, draining, or working any mine or any staith, building, or erection, used in conducting the business of any mine, or any bridge, waggon way, or trunk, for conveying minerals from any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

4 & 5 Vict. c. 56, s. 2, commutes the sentence to transportation.

CHAPTER VI.

OF THE STATUTES AFFECTING THE RELATIONS BETWEEN MASTERS AND SERVANTS IN MINING CONCERNS.

THE 20 Geo. 2, c. 19, enacts, that all complaints, differences, and disputes which shall arise between masters or mistresses, and artificers, miners, colliers, keelmen, pitmen, &c., employed for any certain time, or in any other manner, shall be heard and determined by one, or more justices of the peace of the county, riding, city, liberty, town corporate, or place where such master or mistress shall inhabit, and the justice or justices is, and are empowered to examine upon oath any such miner, &c., touching any such complaint, difference or dispute, and to make such order for payment of so much wages to such miner, &c., as shall seem just and reasonable, (or by 4 Geo. 4, c. 44, s. 5, that shall appear due), provided that such sum do not exceed 5*l.*, and in case of refusal or non-payment for twenty-one days, the justice or justices may issue a warrant of distress against the goods and chattels of the master or mistress.

By sect. 2, The justices or (justice) are empowered upon application or complaint upon oath by the master, concerning any misdemeanor of such miner, &c., in

his service or employment, to hear and determine it, and to punish the offender by commitment to the house of correction for any time not exceeding one calendar month, or by abating some part of his wages; or on complaint of the miner, &c., to discharge him from his employment. An appeal to the quarter sessions is given against the orders of justices, but the certiorari is taken away. This act is extended by 27 Geo. 2, c. 6, s. 2, to the tanners and miners in the Stannaries.

The 6 Geo. 3, c. 25, s. 4, give justices the power of enforcing contracts with workmen, its powers, however, are extended by the 4 Geo. 4, c. 34, which enacts, that if any miner, collier, keelman, pitman, &c., shall contract with any person or persons to serve him, her, or them, for any time, or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract, such contract being in writing and signed by the contracting parties; or having entered into such service shall absent himself, or herself, from his or her service before the term of his or her contract, (whether such contract shall be in writing or not), shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same, it shall be lawful for any justice of the peace of the county or place where such miner, &c. shall have so contracted or be employed, or be found, upon complaint on oath by the person or persons with whom such miner, &c., shall have contracted, or by his, her, or their steward, manager or agent, to issue his warrant for apprehending such miner, &c., and to examine into the nature of the complaint, and to

commit such miner, &c., for a reasonable time not exceeding three months, or abate his wages, or to discharge him from his service.

This act also (sect. 4), after reciting that masters or employers often reside at considerable distances from the parishes or places where the businesses are carried on, or are occasionally absent for long periods of time, and during such residences or occasional absences, intrust their business to the management of stewards, agents, bailiffs, partners, or managers, whereby such miners, &c., are subject to great difficulties and hardships, and put to great expense in recovering their wages, empowers justices (or a justice) of the county or place, where such miner, &c., shall be employed, upon the complaint of such miner to summon such steward, agent, bailiff, foreman, or manager, in like manner as the master might have been summoned under the previous acts, and to make an order for the payment by such steward, &c., of the wages due, provided they do not exceed 10*l.*, and on default, to issue a warrant of distress against the goods of such steward, &c.

The previous act, 6 Geo. 3, c. 25, recited and extended by this act, was declared not to extend to the Stannaries in the counties of Devon and Cornwall, or to lessen the jurisdiction of the chamberlain of the city of London, or of any other Court within the said city touching apprentices: the latter act is declared not to impeach or lessen the jurisdiction of the chamberlain of the city of London, but no mention is made in it of the Stannaries, and whether it extends to them or not may admit of some question.

These acts only extend to cases where the relation of

master and servant exclusively exists ; and not to any case where work is done under a contract, or a sum certain, or where the hours of work are entirely left in the discretion of the contracting party (*a*).

The statute 39 & 40 Geo. 3, c. 57, empowers justices to enforce the contracts of miners in coal and iron mines, by the infliction of a penalty not exceeding 40*s.* and in default of payment by imprisonment ; and to punish, by imprisonment not exceeding three months, the offence of fraudulently walling, or stacking coals, or iron stone, or iron ore with intent to defraud their employers (*b*).

The 5 & 6 Vict. c. 99, prohibits the employment of females, and of males under the age of ten years in mines or collieries under ground, and prohibits persons being apprenticed under ten years, or for longer than eight years ; it makes void every indenture contrary to the act, and declares that every apprentice serving within a mine at the time of the passing of it shall be discharged from the apprenticeship at the age of eighteen years ; penalties are inflicted on parents or guardians misrepresenting the age of persons employed ; these provisions, however, do not apply to persons working above ground ; it is also provided (s. 8,) that where there shall be any

(*a*) *Lancaster v. Greaves*, 9 B. & C. 838, as to the requisites of convictions and commitments under these acts, see *Reg. v. Cooper*, 16 T. R. 509. *Massey v. Johnson*, 12 East, 78. *Reg. v. Justices of Staffordshire*, 12 East, 575. *Reg. v. Rhodes*, 4 T. R. 220. *Reg. v. Lewis*, 13 L. J., M. C. 46. In *re Copestick*, 1 New Sess. Cas. 181. In *re Tordoff*, *ibid.* 176. In *re Walker*, *ibid.* 182. In *re Reynolds*, *ibid.* 51.

(*b*) Owners of coal and iron mines, are in the habit of contracting for coal and iron being raised by the weight, and often advance money to the miners on the assumed weight of their heaps ; hence the temptation to dispose the heaps so as to make them appear heavier than they are.

entrance to a mine or colliery by means of a vertical shaft, or pit, or inclined plane, or where there shall be any communication within any part of a mine or colliery to any other part thereof by a vertical shaft, or pit, or inclined plane, then it shall not be lawful for any owner of any such mine or colliery, to allow any person or persons other than a male of the age of fifteen years and upwards, to have charge of any steam engine, or any other engine, windlass, or gin, (whether driven or worked by manual labour or any other power whatsoever), or to have charge of any part of the machinery, ropes, chains, or other tackle of any such engine, by or by means of which engine, machinery, ropes, chains, or other tackle persons are brought up or passed down any such vertical shaft or pit, or inclined plane.

Sect. 9, provides that in case of a windlass or gin, worked by a horse or other animal, the person on the bank under whose direction the driver of the animal used for such windlass or gin shall act, shall for the purposes of this act be deemed to be the person having the charge thereof. Prohibitions are directed against the payment of wages at public houses; provisions are made for the appointment of inspectors in mines and collieries, and the enforcing of penalties against owners, agents, or workmen infringing the provisions of the act; and an appeal is given in certain cases to the quarter sessions.

APPENDIX.

6 & 7 WM. 4, CAP. 106.

An Act to make Provision for the better and more expeditious Administration of Justice in the Stannaries of Cornwall, and for the enlarging the Jurisdiction and improving the Practice and Proceedings in the Courts of the said Stannaries. [20th August 1836.]

Whereas there has existed throughout the Stannaries of Cornwall, a Court in which the vice warden has in certain cases, wherein tin or tinnery matters connected with tin are concerned, exercised original equitable jurisdiction: and whereas there has existed a Court in each of the Stannaries of Cornwall, called the steward's Court, and in which the steward of the Stannaries has exercised a common law jurisdiction in such like cases: and whereas the jurisdiction so exercised by the vice warden and the steward respectively has been confined to cases wherein tin or tinnery are concerned: and whereas in late times lead, copper, and other metals and metallic minerals than tin have been discovered in the county of Cornwall, and over the matters connected with the working for and purifying and smelting of which lead, copper, and other metals and metallic minerals such jurisdiction has not been considered to extend: and whereas the various persons in the said county working and interested in such lead, copper, and other metals and metallic minerals are greatly inconvenienced in their disputes in cases where such metals and metallic minerals other than tin are concerned, and are put to great inconvenience in obtaining redress therein: and whereas it is expedient to unite the Court

Appoint-
ment of
future vice
warden.

Vice warden
to hold office
during good
behaviour.

Power of
removal.

of Equity of the vice warden with the Courts of common law of the steward of the said Stannaries, and to extend the jurisdiction of the Court to and over all metals and metallic minerals in the said Stannaries, and to and over all transactions connected therewith in the said county of Cornwall, in manner hereinafter mentioned, and also to confirm, alter and enlarge the powers of such Court in various particulars, and to make other provision than heretofore for the hearing of appeals and writs of error therefrom: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the death or resignation or other removal of the present vice warden it shall and may be lawful for the Duke of Cornwall for the time being, if of full age, or his Majesty and his successors, king or queen regnant of England for the time being, if there be no Duke of Cornwall, or if the Duke of Cornwall for the time being is under age, to nominate and appoint from time to time (by letters patent under the privy seal of the duchy of Cornwall or under the great seal of England, as the case may be,) a fit person, being a barrister at law of five years' standing at the least, to be called the vice warden of the Stannaries.

II. And be it further enacted, That the present vice warden and every future vice warden shall be Judge of the Court hereinafter mentioned, and which shall have both a common law and an equity side, and shall comprehend the Court heretofore the Court of the vice warden and the Court heretofore the Courts of the Stannaries, and that the vice warden for the time being shall hold such office during his good behaviour: provided always, that it shall and may be lawful for the Duke of Cornwall for the time being, if of full age, or his Majesty and his successors, King or Queen regnant of England for the time being, if there is no Duke of Cornwall, or if the Duke of Cornwall for the time being be under age, on a requisition to him for that purpose, stating therein at length sufficient grounds, and signed by the majority or five of the council, or of the commissioners or principal officers of the duchy of Cornwall, but not otherwise, (the lord warden of the Stannaries being always one of the persons signing such requisition,) to remove the person for the time being holding the said office of vice warden.

III. Provided always, and be it enacted, That, notwithstanding anything herein contained, the appointment of vice warden (should any vacancy occur during the time the present lord warden of the Stannaries holds that situation) shall be in such lord warden, subject nevertheless to all the provisions as to the qualification of the person to be appointed vice warden, and his removal, as hereinbefore contained.

Present lord warden to have the appointment of vice warden in case of vacancy.

IV. And be it further declared and enacted, That the original equitable jurisdiction heretofore lawfully exercised by the vice warden for the time being, shall and may be henceforth exercised by the present and every future vice warden for the time being, and that the present and every future vice warden for the time being shall have, exercise, and enjoy the same equitable jurisdiction, and the same power and authority in all matters and things brought before him, so far as relates to the working, managing, conducting, or carrying on any mine worked for any lead, copper, or other metal or metallic mineral within the said county of Cornwall, or to the searching for, working, smelting, or purifying any lead, copper, or other metal or metallic mineral within the said county, in as full and ample a manner as if the same had related to any tin or tin ore, or tin mine, or mine worked for tin, in the said county: provided always, that nothing herein contained shall be deemed or taken to affect any suit or matter now pending in any Court of law or equity.

Original equitable jurisdiction of vice warden confirmed, and extended to matters connected with all metals and metallic minerals in the county in the same way as heretofore over tin.

V. Provided nevertheless, and be it enacted, That all decrees, orders, and acts, as well already or hereafter to be made or done by the vice warden for the time being, shall in each and every case be subject to be reheard and varied by the vice warden for the time being according to the practice of the Court, and that the lord warden for the time being shall have full power and authority on any appeal or appeals presented to him for that purpose, within the time limited by the practice of the Court, (such appeal or appeals being left with the secretary of the lord warden at the duchy office,) and, with the aid and assistance of three or more members of the judicial committee of his Majesty's privy council for the time being, to affirm, alter, or reverse any decrees, orders, or acts already or hereafter made or done by the vice warden for the time being, either in whole or in part, and to dismiss such appeal or appeals, with costs or otherwise, as may to the lord

Decrees, &c. of vice warden subject to rehearing and appeal.

Judgments on appeal to be transmitted to vice warden's Court.

warden so aided and assisted, seem just : provided, that the judgment pronounced by the lord warden so aided and assisted on any appeal or appeals presented shall be transmitted to the Court of the vice warden, to be by such Court carried into effect, and shall be subject to appeal to the lords spiritual and temporal in Parliament assembled.

The Courts of the Stannaries consolidated, and to be held before the vice warden, who is to have the same jurisdiction as the steward has had ;

VI. And be it further enacted, That the Courts of law of the respective Stannaries heretofore held before the stewards or steward thereof shall be one Court for all the Stannaries, and shall be held by and before the vice warden for the time being, who as Judge thereof shall have, exercise, and enjoy the same common law jurisdiction, and the same powers, privileges and authorities with reference thereto, and shall transact, do, and perform the same duties, matters, and things in relation thereto, as have heretofore been lawfully transacted, done, performed, or to be exercised or enjoyed by the steward for the time being of any of the Stannaries.

and also similar jurisdiction in all cases connected with all metals and metallic mineral* in Cornwall.

VII. And be it further enacted, That such vice warden for the time being shall also have, exercise, and enjoy the same common law jurisdiction and the same power and authority in all matters and things which shall be brought before him in any way connected with the working, managing, conducting, or carrying on any mine worked for lead, copper, or any other metal or metallic mineral within the said county of Cornwall, or in any way relating to lead, copper, or any other metal or metallic mineral, or the searching for, working, smelting, or purifying lead, copper, or any other metal or metallic mineral within the said county, in as full and ample a manner as if the same had been connected with or related to any tin or tin ore, or tin mine, or mine worked for tin, in the said county : provided always, that it shall and may be lawful for either or any of the parties, plaintiff or defendant, against whom any judgment or order or sentence shall be given, to appeal therefrom to the lord warden for the time being, and that the lord warden for the time being shall have power and authority to receive appeals (the same to be lodged with his secretary at the Duchy Office as aforesaid) from such judgments, orders, and sentences, and shall have power and authority, being aided and assisted by three or more members of the judicial committee of his Majesty's privy council for the time being, to hear such appeals, and to affirm, alter, and reverse such

Appeal.

judgments, orders, or sentences, in whole or in part, or to dismiss the said appeals, with costs or otherwise, as may be just: provided always, that a record of every judgment, order, or sentence pronounced by the lord warden so aided and assisted as aforesaid, and signed by such lord warden, be remitted to the Court of the vice warden, to be by such Court carried into effect, according to law: provided also, that upon any appeal from any judgment upon the verdict of a jury, the lord warden, so aided and assisted as aforesaid, shall not reverse, alter, or inquire into the said judgment, except only for error of law apparent upon the record; and that every judgment of the lord warden shall be subject to an appeal to the lords spiritual and temporal in Parliament assembled.

Judgment on appeal to be sent to the vice warden's Court.

Judgment not to be reversed except on error of law.

VIII. And be it further enacted, That any party to any action at law brought in the said Court may apply for a new trial in any such action to the vice warden within eight days after the trial of such cause, if the said vice warden shall be then sitting, or within the first four days of the next term, and the said vice warden may grant a new trial upon any of the grounds on which new trials are now granted by the Courts at Westminster, and upon such terms and conditions as by the said vice warden shall be thought reasonable; and the said vice warden, if he shall think that an impartial trial cannot be had in Cornwall, may direct that the nisi prius record on any cause shall be sent to the Judges of assize for the county of Devon, who shall have authority to try such cause, and after the trial to cause such record to be transmitted to the Court of the vice warden, who shall proceed on the said record as if the cause had been tried in his own Court: provided always, that the orders of the said vice warden upon such application for a new trial shall be subject to such appeal as hereinbefore provided as to other decrees, orders, and acts of the said vice warden.

Vice warden may grant a new trial.

IX. And be it enacted, that the service of every writ of subpoena to attend and give evidence hereafter to be issued out of either side of the said Court of the vice warden, and served upon any person in any part of England or Wales, shall be as valid and effectual in law, and shall entitle the party suing out the same to all and the like remedies by action or otherwise howsoever, as if the same had been served within the jurisdiction of the said Court of the vice warden; and that in case the person

Service of subpoena on witnesses good in any part of England or Wales.

and to be
enforced by
process
from King's
Bench;

provided
expenses be
tendered.

Where judg-
ment ob-
tained, and
the person
and effects
cannot be
found within
the jurisdic-
tion of the
Court of the
vice warden,
any of the
superior
Courts may
issue exe-
cution.

so served shall not appear according to the exigency of such writ, it shall be lawful for the said Court of the said vice warden, upon oath or affirmation to be taken in open Court, or affidavit, of the personal service of such writ, to transmit a certificate of such default under the seal of the said Court to the Court of King's Bench at Westminster; and the said last-mentioned Court may and shall thereupon proceed against and punish by attachment or otherwise, according to the course and practice of the same Court, the person so having made default, in such and the like manner as the same Court might have done if such person had neglected or refused to appear in obedience to a writ of subpoena issued to compel the attendance of witnesses out of such last-mentioned Court.

X. Provided always, and be it further enacted, That the said Court of King's Bench shall not in any such case as aforesaid proceed against or punish any person, nor shall any such person be liable to any action, for having made default by not appearing to give evidence in obedience to any such writ of subpoena as aforesaid for that purpose, issued under the authority of this act, unless it shall be made to appear to the said Court of King's Bench that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpoena was served upon such person.

XI. And be it further enacted, That whenever a plaintiff or defendant in any action or suit in which judgment shall be recovered in the said Court of the vice warden shall remove his person or goods or chattels from or out of the jurisdiction of the said Court of the vice warden, it shall and may be lawful for any of the superior Courts at Westminster, upon a certificate from the registrar, under the seal of the said Court of the said vice warden, of the amount of final judgment obtained in any such action, to issue a writ of execution thereupon, for the amount of such judgment and the costs of such writ and certificate, to the sheriff of any county, city, liberty, or place, against the person or goods of the party against whom such final judgment shall have been obtained, in such manner as upon judgments obtained in any of the said superior Courts at Westminster.

XII. And be it further enacted, That in case any rule of the said Court of the vice warden cannot be enforced by reason of the non-residence of any party or parties within the jurisdiction thereof, it shall be lawful, upon a certificate of such rule by the registrar, under the seal of the said Court of the said vice warden, and an affidavit that by reason of such non-residence such rule cannot be enforced, to make such rule a rule of any one of the said Courts at Westminster, if such superior Court shall think fit, and that thereupon such rule shall be enforced as a rule of such superior Court.

Rule of the Court which cannot be otherwise enforced may be enforced by making it a rule of a superior Court at Westminster.

XIII. And be it further enacted, that neither the vice warden for the time being, nor the Court of such vice warden, shall have, use, or exercise any power or authority, save as hereby provided, and that any person against whom proceedings shall be instituted in the Court of the vice warden shall, after the appearance entered, be at liberty to demur or plead to the jurisdiction of the said Court; but that no question as to the jurisdiction of the said Court with respect to the matters embraced in such proceedings shall hereafter be raised unless such person shall within fourteen days after appearance entered by or on behalf of himself, or entered by the person instituting such proceedings in manner hereby provided, demur or plead to such proceedings by filing a statement of the grounds of such demurrer or plea at the registrar's office, and serving a copy thereof on the person instituting such proceedings, or his solicitor or attorney.

The vice warden to have no jurisdiction except as hereby provided, and any parties may demur to jurisdiction of the Court, but if not, the jurisdiction not to be questioned.

XIV. And be it further enacted, That the vice warden for the time being shall have power and authority from time to time, and as often as circumstances shall require, to make and prescribe such rules and orders touching and concerning the forms and manner of proceeding in the Court of the vice warden, and the practice and pleadings in all matters to be brought therein, the appointing commissioners to examine witnesses, the taking of examinations *de bene esse*, and allowing the same as evidence, the process of the said Court, and the mode of executing the same, the fees reasonable to be demanded by attornies, solicitors, and others, and by the officers of the said Court, for business by them transacted in the said Court, and such other rules, orders, and regulations as shall from time to time seem necessary and proper for expediting the business of the said Court with most convenience and at most reasonable expense to the parties concerned therein, and that

Vice warden empowered to make rules and orders, touching the practice and proceedings of the Court.

the vice warden for the time being shall have power to revoke, alter, and amend the rules, orders, and regulations so from time to time made; provided that the rules, orders, and regulations so at any time made by such vice warden for the time being are not inconsistent with this act or any of the provisions herein contained, and that such of them as shall apply to the equity side of the said Court be approved of by the Lord Chancellor of England, and that such of them as apply to the common law side of the said Court be approved of by a Judge of one of the superior Courts of common law at Westminster; provided always, that such rules and orders, when so approved, shall be transmitted to one of his Majesty's principal secretaries of state, and be laid before both Houses of Parliament within one month from the making thereof, if Parliament be then sitting, or if Parliament be not then sitting, within one month from the commencement of the then next session of Parliament: provided nevertheless, that all rules, regulations, and orders, and all forms of practice, heretofore in use, and all fees heretofore authorized or accustomed to be taken, in the Court of the vice warden for the time being, or in any of the Courts of the Stannaries, shall, (except so far as the same or any of them are hereby annulled or are inconsistent herewith) be and be considered binding and valid rules, regulations, and orders, and forms of practice, and authorized fees, until the same be altered, amended, or revoked by virtue of the powers hereby given.

Old practice to continue until such rules and orders are made.

Vice warden authorized to regulate how evidence shall be taken.

XV. And be it further enacted, That the vice warden for the time being shall in all cases in equity brought before him, whether by bill, petition, or otherwise, have power and authority to take the whole or any part of the evidence therein, either *visá voce* on oath or affirmation before himself or before the registrar, or before persons duly authorized by him for administering oaths and taking affidavits, or on depositions taken before the registrar or commissioners appointed for that purpose, or otherwise as the vice warden may from time to time direct by any general rule to be made by virtue of this act: Provided always, that the said vice warden for the time being may, on interlocutory matters, and in such other cases as to him shall seem desirable, receive evidence either in whole or in part on affidavits, and that either with or without further evidence *visá voce* or on depositions: Provided nevertheless, that the practice heretofore adopted as to taking evidence in the Court of

Old practice to remain

the vice warden and of the steward's Courts shall nevertheless in the meanwhile continue in each and every case until the same shall be altered by virtue hereof or of the powers herein contained.

until otherwise ordered.

XVI. And be it further enacted, That it shall and may be lawful for the vice warden to direct an issue of any fact arising before him in any suit instituted by bill, petition, or otherwise on the equity side of the said Court, to be tried by a jury, and to issue process to compel the attendance of jurors and witnesses for that purpose, and that the vice warden shall have all necessary powers for trying the same and carrying the verdict thereof into execution; and that after any such issue shall be tried a new trial may be moved before the vice warden for the time being, who shall have power to grant or refuse such new trial according to the rules of the common law and practice of the Courts of Westminster in granting or refusing new trials.

Vice warden may direct and try an issue of fact arising on the equity side.

Motion for new trial.

XVII. And be it further enacted, That it shall and may be lawful for the vice warden for the time being, whether he be at the time in the county of Cornwall or otherwise, in all cases which may be brought before him, whether in the said county of Cornwall or otherwise, over which cases he has jurisdiction, to make such order by way of injunction or otherwise, as the nature of the case may require, notwithstanding he may have adjourned his Court to some future time or some other place; and that for the entry of pleadings, orders, proclamations, and other matters touching the practice of the Court in process and execution the said Court shall be considered and be at all times open; provided that nothing be therein done on any Sunday, Christmas Day, Good Friday, or any day appointed for a public fast or thanksgiving.

Power to vice warden to make orders though Court adjourned or not sitting.

XVIII. And be it further enacted, That in case the vice warden shall in any proceedings instituted for that purpose make any decree or decretal order against any person for the payment of any money due or payable in respect of the working or management of or the providing goods for any mine worked for any metal or metallic mineral, and the person against whom such order or decretal order shall be made, or any person in trust for him, shall have any share or interest in such mine, and shall not pay the sum so decreed to be paid, it shall and may be lawful for the vice warden, under such regulations and in such way as to him shall seem

Vice warden ordering a person having a share in a mine to pay money may order a sale of his share.

fit, to cause a sale of such share or interest, or of so much thereof as shall be necessary to raise such sum and the costs attending such sale.

The vice warden's seal to be the seal of his Court.

XIX. And be it further enacted, That the seal of the Stannaries heretofore used by and considered as the seal of the vice warden for the time being shall be and be deemed and taken to be the seal of the Court of the vice warden, and that every process issuing from either the equity or common law side of the said Court shall issue under such seal; and that all orders, proceedings, documents, and copies by the laws of the Stannaries as now existing, or by the act or by any rule or order of either side of the said Court, or of the vice warden as judge of the said Court, as shall be required to be sealed, shall be sealed therewith.

All barristers and solicitors may practise in vice warden's Court.

If others than solicitors or attorneys practise, to be deemed a contempt of Court.

XX. And be it further enacted, That all barristers at law, and all attornies and solicitors of any of the superior Courts of law or equity at Westminster may appear and plead in any proceedings in the said Court of the vice warden; and in case any person, not being an attorney or solicitor of such superior Courts, shall practise in the said Court of the vice warden as attorney or solicitor, he shall be deemed guilty of a contempt of the said Court, and be liable to all the penalties incident thereto, on complaint thereof made to the said Court; and that all the laws and statutes now in force concerning attornies or solicitors shall, so far as the same are applicable, extend to attornies or solicitors practising in the said Court of the said vice warden.

Court to have jurisdiction throughout the county of Cornwall, to be a Court of record, and to be held at Truro.

XXI. And be it further enacted, That the Court of the vice warden shall have jurisdiction throughout the county of Cornwall, and be held at Truro in the said county, and shall be a Court of record, and shall have within the limits of its jurisdiction all the powers, rights, privileges, and incidents of a Court of record as fully and amply to all intents and purposes as the same are used or exercised or enjoyed by any of his Majesty's Courts of law at Westminster; and that the vice warden for the time being shall have, use, exercise, and enjoy all the powers, rights, privileges, and exemptions of a Court of record; and that the sitting of the said Court shall be held as often as shall be found necessary, and at least once in every three calendar months, on such days as the vice warden shall from time to time appoint.

Appointment of registrar.

XXII. And be it further enacted, That it shall and may be lawful for the Duke of Cornwall for the time

being, or for his Majesty, his heirs and successors, king or queen regnant of England for the time being, in case there shall be no Duke of Cornwall or the Duke of Cornwall for the time being shall be under age, by letters patent under the privy seal of the Duchy of Cornwall or under the great seal of England, as the case may be, from time to time to appoint a fit and proper person, being a barrister at law or a solicitor or attorney of one of the superior Courts at Westminster, to be and act as the registrar of the said Court of the vice warden, and to attend upon and assist the said vice warden in his said Court, whether sitting as a Court of law or equity, and to enter and draw up all orders, decrees, sentences, and judgments of all kinds made and pronounced by him, and to take such accounts and to execute such references as the said vice warden shall direct, and that the person so appointed as registrar shall hold his office during his good behaviour: provided always, that it shall and may be lawful for the Duke of Cornwall for the time being, if of full age, or his Majesty, his heirs and successors, king or queen regnant of England for the time being, if there be no Duke of Cornwall, or if the Duke of Cornwall for the time being be under age, on a requisition to him for that purpose, stating therein sufficient grounds, and signed by the vice warden for the time being and by five or more of the council or of the commissioners or of the principal officers of the duchy, but not otherwise, to remove the person for the time being holding the said office of registrar.

Removal of
registrar.

XXIII. Provided always, and be it enacted, That, notwithstanding anything herein contained, the appointment to the office of such registrar shall, during the time the present lord warden of the Stannaries holds such situation of lord warden, be in such lord warden, subject nevertheless to all the provisions as to the qualification of the person appointed, and his removal, as hereinbefore contained.

Present lord
warden to
have the ap-
pointment
of registrar.

XXIV. And be it further enacted, that it shall and may be lawful for the vice warden for the time being to appoint by writing under the seal of his Court a fit and proper person to be and act as his secretary, and also in like manner to appoint one other fit and proper person to be and act as prothonotary, or assistant registrar in the said Court, and also in like manner to appoint one other fit and proper person (who shall enter into such security as the vice warden for the time being shall think fit) as collector for the said Court.

Vice warden
may appoint
secretary,
prothono-
tary, and
collector.

The salary
of the vice
warden
and other
officers.

XXV. And whereas it is expedient that the vice warden for the time being, and the registrar, and the other before-mentioned officers of his Court, should be paid by fixed salaries, and that all fees received by such registrar and the other officers aforesaid for business done in the Court should be accounted for in manner hereinafter mentioned: and whereas his Majesty has been graciously pleased to direct that one moiety or half part of the salaries of the vice warden and of the before-mentioned officers of his Court should be paid out of and be a charge upon the revenues of the duchy, subject nevertheless to be in part indemnified by contribution of part of such fees so to be accounted for as aforesaid: and whereas it is expedient that for the purpose of raising money sufficient, with the remaining portion of such Court fees, to pay the other moiety or half part of the aforesaid salaries of the said vice warden and the aforesaid officers of his Court, a small assessment should be made on all metals and metallic minerals (except tin ore) over all matters connected with which the jurisdiction of such Court is hereby extended as aforesaid, and which shall be from time to time brought to sale in or withdrawn from any mine in the said county of Cornwall: be it therefore enacted, that there shall be paid and payable, in the manner hereinafter mentioned, the yearly sums following as and for the salaries to the vice warden, and the before-mentioned officers of his said Court for the time being; (*videlicet*) to the vice warden the sum of one thousand five hundred pounds, to the registrar the sum of five hundred pounds, to the person who shall be so appointed the secretary to the vice warden the sum of one hundred pounds, to the prothonotary or assistant registrar the sum of two hundred pounds, and to the collector the sum of thirty pounds; which said several sums shall be paid from time to time half-yearly, in manner hereby provided, free and clear from all taxes and deductions whatsoever, on the twenty-fifth day of March and on the twenty-ninth day of September in each year, by equal portions, the first of such respective portions to be paid on the twenty-fifth day of March next; and that if any person at any time holding any of the said offices shall die, resign or be removed from the same, the executor or administrator of the person so dying, or the person so resigning or being removed, shall be entitled to have such proportionate part of his salary as shall have accrued during the time that such person shall have

Apportion-
ment of
salary on
death, &c.

held his office since the last payment; and that the successor of any such person so dying, resigning, or being removed as aforesaid, shall be entitled to receive such portion of his salary as shall be accruing or shall accrue from the day of such death, resignation or removal.

XXVI. And be it further enacted, That a moiety, or half part of the aforesaid salaries to the vice warden for the time being and to the aforesaid officers of his said Court shall be a charge on the revenues of the Duchy of Cornwall, and that the same shall be paid by the receiver general for the time being of the said duchy, under debentures for that purpose from the auditor for the time being of the said duchy, in which the said auditor is hereby authorized to issue; and that the said receiver general shall, on the twenty-fifth of March and the twenty-ninth of September in each year, under the debentures so issued, pay, free from all deductions, the sums following; (*videlicet*,) to the vice warden for the time being the sum of three hundred and seventy-five pounds, to the registrar the sum of one hundred and twenty-five pounds, to the person so appointed secretary to the vice warden the sum of twenty-five pounds, to the prothonotary or assistant registrar the sum of fifty pounds, and to the collector the sum of seven pounds ten shillings.

The revenues of the duchy charged with half the salaries.

XXVII. And be it further enacted, that the person so as aforesaid appointed secretary to the vice warden, and the said prothonotary or deputy registrar, and the said collector, shall once in every half-year account for and pay over to the registrar for the time being of such Court all fees received by them by virtue of their respective appointments during the previous half-year; and that the registrar for the time being shall forthwith make out a full and true account of all fees received by him during such preceding half-year, and of all fees received by the aforesaid officers of the said Court, and accounted for and paid to him as aforesaid, for the same period; and that such registrar shall have such account audited by the said vice warden for the time being, in which account and audit there may and shall be charged and allowed such small sums of money as to the vice warden shall seem reasonable for the keeping order in, and the lighting, airing, and cleansing the place in which such Court shall be held, and shall transmit a copy of such account so audited to the auditor for the time being of the said duchy, and shall pay or cause to be paid to the said receiver or his deputy, one-third

Secretary, &c. to account for all fees half-yearly.

Account to be audited by vice warden, and one-third of fees to be paid in aid of moiety of the salaries charged on the duchy revenues.

part of the total amount of fees so appearing to have come to the hands of such registrar, for which sum so paid the receiver shall on passing his accounts give credit to the duchy in part discharge of the moiety of the salaries so as aforesaid charged on the revenues of the said duchy.

Assessment of one farthing in the pound sterling on all metals, &c. except tin; and head manager of every mine to make a return quarterly of the quantity and value.

XXVIII. And be it further enacted, That there shall be paid and payable the sum of one farthing in the pound sterling on the value of all metals and metallic minerals (except tin and tin ore) which shall be from time to time brought to sale in or withdrawn from any mine within the said county of Cornwall; and that the head manager of every mine in the said county of Cornwall shall, within ten days after each quarterly account of the mine over which he is head manager shall have been or ought to have been made up, transmit to the registrar for the time being of the vice warden's Courts a full, true, and particular account and return of all metals and metallic minerals (except tin and tin ore) which shall have been brought to sale in or shall have been withdrawn from the mine of which he is such head manager during the preceding quarter, and shall in such return state the value in money of the respective quantities of the metals and metallic minerals specified therein at the time the same were respectively brought to sale or withdrawn, as the case may be; and that the head manager of every such mine shall on application from the collector of the vice warden's Court pay or cause to be paid to such collector the sum of one farthing in the pound sterling on the aggregate value of all metals and metallic minerals (except tin and tin ore) which shall have been brought to sale or withdrawn from such mine during the preceding quarter; and that every such payment by such head manager shall be considered as costs, and shall on passing his account with respect to the mine of which he is such head manager be allowed to him accordingly.

Registrar, out of the assessment and the remaining fees, to pay the other moiety of the salaries.

XXIX. And be it further enacted, That the registrar for the time being shall, out of the monies which shall from time to time be in his hands by means of such assessments as aforesaid, and by means of the remaining of the Court fees as aforesaid, pay to the said vice warden and to himself and the other officers aforesaid of the said Court the sums following, being other moiety of the said salaries in manner following; (that is to say,) shall pay on the twenty-fifth day of March and on the twenty-ninth day of September in each year, free

from all deductions, to the said vice warden the sum of three hundred and seventy-five pounds, to himself the registrar the sum of one hundred and twenty-five pounds, to the person filling the situation of secretary to the vice warden the sum of twenty-five pounds, to the prothonotary the sum of fifty pounds, and to the collector the sum of seven pounds ten shillings.

XXX. And be it further enacted, That the said registrar for the time being shall at the end of every half-year lay before the vice warden for the time being a full, true, and particular account of the balance remaining in his hands at the commencement of such preceding half-year, and of all monies received by him during such last half-year in respect of such assessment as aforesaid, and when and from whom and from what mine received, and also shall in such account give credit for the remaining portion of the said Court fees so in his hands after such payment to the auditor of the duchy as aforesaid, and shall also in like manner lay before the vice warden a full, true, and particular account of all salaries and other expenses paid by such registrar during the same period; and that a balance shall be thereby struck, showing the balance remaining in the hands of such registrar at the end of the then last half-year; and that thereupon the vice warden for the time being shall and is hereby required to audit the said account, and also the said account for Court fees herein-before mentioned, and if the same shall be found correct to allow the same respectively, by putting his signature thereto; and that such accounts when so allowed shall be filed amongst the records of the said Court, and be open for the inspection of all persons in the usual way: provided always, that if it shall at any time appear to the vice warden for the time being, on auditing such account of the registrar, that there remains a general balance in his hands sufficient to meet all payments hereby authorized to be made thereout for the next half-year, then and in such case the vice warden shall have power and is hereby required to give notice thereof by advertisement in the county papers, or in such way as he shall think fit; and that thereupon no assessment shall be made or become payable in respect of the said one farthing in the pound sterling on the value of all metals and metallic minerals as aforesaid during such succeeding half-year: provided nevertheless, that, although no such assessment shall in such case be made during such

The registrar to have his accounts of receipts from the assessment and the fees, and his payments thereout, audited by the vice warden half-yearly.

If at the end of any half-year a balance appears sufficient for the next half-year, no assessment to be made until the expiration of such half-year;

but nevertheless the

head manager to make the returns.

period, the said manager of every mine is required to and shall make such return as aforesaid to the said registrar of all metals and metallic minerals (except tin and tin ore) brought to sale or withdrawn from the mine over which he is such head manager, precisely as if such assessments were or would be payable in respect of the ore specified in such return.

Penalty on head manager omitting to make any return, or making a false return.

XXXI. And be it further enacted, That if the head manager of any mine shall omit to make such full, true, and particular return as hereby required of the quantities of metals and metallic minerals (except tin and tin ore) brought to sale or withdrawn as aforesaid in the mine of which he is such head manager, or of the value thereof, as is hereby required, or shall, on demand made, omit to pay or cause to be paid such assessment as aforesaid, or shall wilfully make any false or incorrect return, then and in every such case such head manager shall be subject for every such offence to a penalty not exceeding fifty pounds.

Jurors.

XXXII. And be it enacted, That the vice warden for the time being may and shall in the present and every succeeding year order the clerk of the peace of the county of Cornwall to make out a duplicate of the jurors' book at the time in use, or about to be brought into use, or of such part of the said book as such vice warden may think fit to specify in such order; and the clerk of the peace, upon the receipt of such order, shall with all convenient speed make out such duplicate, and deliver the same to the registrar of the Court of such vice warden; and that every such duplicate shall be the book of jurors qualified and liable to serve as jurymen in all cases before the vice warden for the time being, and that every such duplicate shall be kept by the registrar, and shall be by him used as the jurors' book for the time being.

Summoning of jurors.

XXXIII. And be it enacted, That the registrar of the said Court shall cause to be summoned, one week before the first day of each sitting of such vice warden, forty-eight persons named in the jurors book by him kept as aforesaid to attend at the time and place appointed for holding such sitting; and every such summons shall be according to the form given in the schedule hereto annexed, and shall be served either personally on each such person or by leaving it as his dwelling house; and that in summoning such persons regard shall always be had as far as may be to the convenience

of the individuals so summoned ; and no person shall be summoned oftener than once in a year.

XXXIV. And be it enacted, That the registrar of the said Court shall make a list of the jurors so summoned, together with the places of abode and additions, and shall cause their names to be written severally on slips of paper and put into a box, and the names of the jurors for the trial of causes shall be drawn out of the box by the registrar ; and each party may, until no more than twelve remain, object to any person whose name is drawn out, without assigning any cause ; and if any objection is made to the twelve so remaining, it must be stated to, and decided on by the vice warden for the time being ; and if any such objection be allowed, the names of the jurors rejected without cause assigned shall be returned to the box, and drawn again until a sufficient number be found to make a jury of twelve ; and such jury of twelve shall be the jury sworn for the trial : provided always, that if there shall not be twelve persons attending, or against whom no objection shall have been allowed, it shall be lawful for the said vice warden to order the requisite number of persons from among the bystanders to be summoned by the registrar, and sit on the jury, subject to any objections which may be made for causes assigned, except for want of qualification or want of summons : provided also, that the said vice warden may, if he sees fit, direct the registrar to divide the list of forty-eight jurors into two lists, and to require the persons in the one list to attend and serve for so many days at the beginning of the sittings as the said vice warden shall order, and those in the other list to attend and serve for the residue of the sittings, according as the said vice warden shall think fittest for the convenience of the said persons ; and then and in that case the registrar shall divide the said list of forty-eight jurors into two lists, and cause the persons named in each of such lists to be summoned to attend on different days accordingly.

Ballot and
challenge of
jurors.

Jury to
consist of
twelve.
Jury de
circumstan-
tibus.

XXXV. And be it enacted, That if any person having been duly summoned to attend as a juror in the Court of the vice warden, shall not attend in pursuance of such summons, or being thrice called in Court shall not answer to his name, or if any such person being present in Court, or any such bystander in Court, after having been called shall not duly appear, or after his appearance shall wilfully withdraw himself from the

Penalty
on jurors
for non-at-
tendance.

presence of the said Court, it shall be lawful for the said vice warden to impose such fine upon every such person or bystander so making default (unless some reasonable excuse shall be given to the satisfaction of the said vice warden) as to the said vice warden shall seem meet; and if such fine shall not be paid at the time ordered by the said vice warden, the same shall and may be levied by writ of *fieri facias* to be issued out of the common law side of the said Court of the vice warden.

Appoint-
ment of
crier and
usher.

XXXVI. And be it further enacted, That the vice warden for the time being shall and may appoint a fit and proper person to be crier and usher of his said Court, who shall hold his office during the pleasure of the vice warden for the time being, and may be removed in a summary manner, and may and shall receive such fees for acting as crier and usher of the said Court as the said vice warden shall from time to time, by virtue of the provisions herein contained, authorize.

Vice warden
and registrar
not to prac-
tise.

XXXVII. And be it further enacted, that the vice warden for the time being shall not during his continuance in such office practise as a barrister, and that the registrar for the time being of the said Court shall not during his continuance in such office practise as a barrister or solicitor or attorney in such Court, or in any other Court of law or equity in the United Kingdom of England and Ireland.

Vice war-
den, regis-
trar, and
other officers
to take no
fees, &c.
except as
hereby pro-
vided, &c.

XXXVIII. And be it further enacted, that the vice warden for the time being shall not demand or take, upon any pretence, any fee, gratuity, or reward whatever; and that such registrar and other aforesaid officers of the said Court appointed under this act shall not demand or take, upon any pretence whatever, any fee, gratuity, or reward other than and except such as are hereby authorized, or as shall be from time to time settled and allowed by the vice warden for the time being by virtue hereof or of the provisions herein contained; and that if any such person shall offend in that behalf he shall be removed from the office he shall then hold, and be disabled from again holding the same or any other office under this act.

Penalty.

A list of fees
to be hung
up.

XXXIX. And be it further enacted, That a table of all fees for the time being authorized by the vice warden to be taken by any solicitor or attorney practising in his said Court, or by any officer of his said Court, for business done therein, shall be hung up in some conspicuous place in such Court.

XL. And whereas the gaol belonging to the Courts heretofore the Courts of the vice warden and of the Stannaries is situate at Lostwithiel in the said county of Cornwall; and whereas it would tend more to the public convenience that the Court of the vice warden should use as its gaol or prison for all purposes the prison belonging to the county of Cornwall, and situate at Bodmin, in lieu or place of the said gaol at Lostwithiel; be it therefore enacted, that every person hereafter arrested or taken prisoner or detained by virtue of any writ, process, order, decree, or proceeding issuing out of or from or by either side of the said Court of the vice warden of the Stannaries, or committed for contempt of the said Court, shall be taken to the county prison at Bodmin in the said county of Cornwall, or to other the prison for the time being of the said county in the same manner, and subject to the same provisions and regulations in every respect, as if such person were arrested and conveyed to the prison by virtue of any writ, process, order, decree, or proceeding issuing out of any of the superior Courts of law or equity at Westminster, or committed for contempt by any of the said last-mentioned Courts; and the gaoler or keeper for the time being of such county prison as aforesaid is hereby authorized and required to receive into such county prison every person so arrested and conveyed to prison by virtue of any writ, process, order, decree, or proceeding issuing out of or from or by either side of the said Court of the vice warden, or so committed for contempt of the said Court as aforesaid, and to maintain, support, and provide for every such person in the same manner as if he had been arrested and brought to the said county prison by virtue of any writ, process, order, decree, or proceeding issued out of any of the superior Courts of law or equity at Westminster, or were committed for contempt of any of the said last-mentioned Courts; and that all and singular the charges and expenses of maintaining, supporting, and providing for every person so arrested or committed to the said county prison as aforesaid shall be paid and defrayed out of such portion of county rate of the said county of Cornwall as for the time being shall be applicable to the support of the debtors confined in the said county prison.

XLI. And be it enacted, That all jurisdictions, powers, and authorities heretofore lawfully exercised by the vice warden or steward or any Judge of any of the

The county prison at Bodmin to be the prison of the vice warden's Court.

The powers heretofore vested in the vice warden

or steward
or Court of
the Stannar-
ies to be
exercised by
the vice
warden.

Stannaries shall be hereafter exercised by the vice warden for the time being; and that all penalties heretofore authorized to be recovered, and all oaths heretofore required or authorized to be taken, and all acts, matters, and things heretofore required or authorized to be had or done in any of the Courts of the Stannaries, or before the vice warden or the steward of any of the Stannaries, shall be and are hereby required and authorized to be recovered, taken, had, and done before the vice warden or in the Court of the vice warden, as the case may be; and that all proclamations, returns, certificates, exhibits, matters, and things heretofore required to be made, transmitted, or given to or deposited with any of the Courts of the Stannaries, or the vice warden or steward of any of the Stannaries, shall be and are hereby required to be made, transmitted, and given to and deposited with the Court of the vice warden; and all bonds and recognizances heretofore required to be entered into before the steward or any of the Courts of the Stannaries shall be entered into before the registrar of the said Court.

Removal of
causes in
certain
cases to the
Court of
King's
Bench.

XLII. And be it further enacted, That it shall be lawful for the Court of King's Bench at Westminster, on the application of any party to any action or suit on the common law side of the said Court of the vice warden, on special and sufficient cause shown by affidavit to the satisfaction of such Court of King's Bench, that an impartial or sufficient trial cannot be had in such Court of the vice warden, to remove, by writ of certiorari, all proceedings which may have been had in such action or suit, and to deal therewith, and to make such orders respecting the same and the future trial of and proceedings in such action or suit as to the said Court of King's Bench shall seem meet.

All existing
laws, cus-
toms, &c.
not incon-
sistent with
this act or
the law of
the realm
preserved.

XLIII. And be it further enacted, That all acts, statutes, laws, liberties, privileges, customs, rights, usages, and freedoms at the time of passing this act in force in any of the Stannaries of the said county of Cornwall shall, notwithstanding anything herein contained, continue and be and have the same force and effect as if this act had not passed, save and except so far as the same or any of them are contrary or repugnant to the laws of this realm or inconsistent with the provisions herein contained, or are annulled, repealed, or altered hereby or by means of any of the powers and authorities hereby given.

XLIV. And be it further enacted, That wherever this act, in describing or referring to any person or matter or thing, uses the words importing the singular number or the masculine gender only, the same shall be understood to include and shall be applied to several persons as well as one person, and to females as well as males, and bodies corporate as well as individuals, and several matters or things respectively as well as one matter or thing respectively, unless there be something in the subject or context repugnant to such construction; and that wherever the word "plaintiff" or "defendant" is used, it shall mean the person instituting the proceedings, or the person against whom proceedings are instituted respectively, in whatever way such proceedings are commenced; and wherever the word "mine" is used, it shall mean any mine, work, or adventure wherein or connected with which any metals or metallic minerals are worked; and that wherever the words "head manager of any mine" is used, it shall mean the captain, purser, or other person who for the time being shall have the principal superintendence over such mine; and that the powers hereby given to the lord chancellor of England shall and may be used by the lords commissioners for the custody of or the lord keeper of the great seal for the time being: provided always, that nothing herein contained shall apply to or affect or extend or be considered as extending to the county of Devon, or the Stannaries within the said county, except as to the service in the said county of Devon of any writ of subpoena issuing out of such vice warden's Court as herein-before provided.

Interpreta-
tion of this
act.

XLV. And be it further enacted, That this act shall commence and take effect on the twenty-ninth day of September one thousand eight hundred and thirty-six.

Commence-
ment of act.

XLVI. And be it further enacted, that this act may be amended, altered, or repealed during the present session of Parliament.

Act may be
altered this
session.

SCHEDULE to which the foregoing act refers.

Form of Summons to Jurors.

You are hereby required to attend and serve as a juror at the sitting to be holden before vice warden of the Stannaries, at his Court, on the day of next.

Registrar of
Day of 18 .

To A. B.

2 & 3 VICT. CAP. 58.

An Act to make further Provision for the Administration of Justice, and for improving the Practice and Proceedings, in the Courts of the Stannaries of Cornwall; and for the Prevention of Frauds by Workmen employed in Mines within the County of Cornwall.

[17th August, 1839.]

Whereas by an act passed in the last session of Parliament, for the abolition of the duties payable on the coinage of tin in the counties of Cornwall and Devon, and for giving compensation in lieu of such duties, and to reduce the duties of customs payable on tin, the tanners of Cornwall were released from all payment of the duty of coinage on tin and tin ore raised within the county, and thereupon it is reasonable and just that the said tin ore be subject to the like assessment as all other metals and metallic minerals raised in the said county are subject by virtue of an act made and passed at a Parliament held in the sixth and seventh years of the reign of his late Majesty, King William the Fourth, to make provision for the more expeditious administration of justice in the Stannaries of Cornwall, and for improving the practice and proceedings in the Courts of the said Stannaries: and whereas also it is expedient that such last-mentioned act be amended in certain cases: be it therefore enacted by the queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the twenty-ninth day of September, one thousand eight hundred and thirty-nine there be paid and payable the sum of one farthing in the pound sterling on the value of all tin and tin ore which shall from time to time be brought to sale in or withdrawn from any mine or stream work within the said county of Cornwall: and that the head manager of every tin mine and stream work shall, in respect of such tin and tin ore, and the assessment and payment of one farthing in the pound sterling thereon, be liable to all such obligations, penalties, and payments, and allowed all such discharges as are imposed on and allowed to the head manager of any other mine in the said county, in respect of the like assessment and payment

Assessment
upon all tin
and tin ore
taken from
mines in
Cornwall.

on other metals and metallic minerals imposed by virtue of the said act passed at the Parliament held in the sixth and seventh years of the reign of his late Majesty king William the Fourth; and that the monies arising by means of such assessment on tin and tin ore shall form part of the general fund provided by the said last-mentioned act, and arising from the assessment on metals and metallic minerals, and be recovered and applied according to the provisions of the said act; and that from and after the said twenty-ninth day of September one thousand eight hundred and thirty-nine there be paid to the collector of such assessment, in addition to his present salary, the sum of ten pounds in every year, charged in equal moieties on the said fund and on the revenues of the duchy of Cornwall, and payable as his present salary is paid.

Additional salary to collector.

II. And whereas the attendance of jurors at the Court of the vice warden of the said Stannaries is long and laborious; be it therefore enacted, that all persons who shall duly attend the said Court as jurors shall be exempted from attendance as jurors at the sessions for the said county of Cornwall for one year from the time of their attendance as jurors at the said Court, and the vice warden of the said Stannaries shall at the close of each of his sittings cause to be made and sent to the clerk of the peace of the said county a list of those jurors who shall have duly attended at his said Court: provided always, that all fines imposed on any juryman for non-attendance, or on any other person, by the said vice warden, be, when received, paid by the registrar of the said Court to the sheriff of the said county, and be by the said sheriff received and accounted for in like manner as all other fines for non-attendance of jurors are by him now by law accounted for.

The jurors attending at the Stannary Courts to be exempted from attending county sessions as jurors for one year.

All fines to be paid over to the sheriff.

III. And be it enacted, that no appeal, by reason of the vice warden granting or refusing a new trial, be allowed on behalf of the defendant, where the damages found by the jury shall not exceed twenty pounds; and that no appeal against any judgment, order, or sentence given in the Court of common law of the said vice warden shall at any time operate therein as a stay of proceedings, unless the party appealing shall, in the opinion of the said vice warden or of the registrar of the said Court (if the matter be referred to him), give previously to his said appeal good security for the satisfaction and due performance of the judgment, order, or

No appeal where damages do not exceed 20*l*.

No appeal from Court of common law of the Stannaries to operate as a stay of proceedings unless security given.

sentence so appealed against, if the same be affirmed, and for payment of such costs incurred by or relating to his said appeal as he may be ordered to pay.

No appeal from a decree of the Court of equity of the Stannaries unless security given.

IV. And be it enacted, That no appeal against any decree, order, or act of the said vice warden, made or done in the Court of equity of the said vice warden, shall at any time operate as a stay of proceedings in such Court, or be allowed, unless the party appealing shall, previously to his said appeal, give good security, in the opinion of the said vice warden or registrar as aforesaid, for payment of such costs incurred by or relating to his said appeal as he may be ordered to pay.

The vice warden of the Stannaries may make rules relating to times of new trials and matters of practice in his Court.

V. And be it enacted, That so much of the said act passed at the Parliament held in the sixth and seventh years of the reign of his late Majesty as regulates the time within which any motion must be made for a new trial shall be and the same is hereby repealed; and that the said vice warden may make such rules and orders in his said Court relating to the time for moving for new trials and rehearings of causes, and to all matters relating to the taxation of costs, and to practice, as to him may from time to time seem fit, anything in such act to the contrary notwithstanding.

The registrar of the Court of the Stannaries may administer oaths and take affidavits; and others, by commission, may take affidavits.

VI. And be it enacted, That the registrar of the said Court of the said vice warden may, in all causes pending therein, administer oaths, take affidavits, and affirmations, and receive depositions relating thereto; and that any commissioner of the superior Courts of common law at Westminster, having by commission from such Courts or any of them authority to take affidavits in matters relating to such Courts or any of them, may, without fee or reward, apply for and have, by commission of the said vice warden under his seal of the Stannaries, authority to take affidavits and affirmations in all suits and matters in the Court of common law of the said vice warden; and that the said vice warden may, without fee or reward, by commission under his said seal, give authority to any solicitor of the superior Court of equity, or to any attorney of any of the said superior Courts of common law resident or practising in or near Westminster, to take affidavits and affirmations in all suits and matters in the Court of the said vice warden.

For adjourning and holding the Court in case of ill-

VII. And be it enacted, That if, in consequence of accident or illness, the said vice warden shall be prevented from attending at Truro on the day appointed for him to hold his sittings there, or any adjournment

thereof, the registrar of the said Court of the said vice warden shall have power from time to time to open and adjourn such Court, and thereupon all persons summoned or bound or having occasion to attend thereat shall attend according to such adjournment as if the vice warden had been present and adjourned the Court; and the vice warden, when he shall be present at such Court so adjourned, shall proceed thereat as if the day of adjournment had been the day originally appointed for the holding thereof; and the said vice warden shall, without delay, send a statement in writing for the lord warden, to be delivered to the secretary of the lord warden, of the cause whereby he was prevented from attending as aforesaid; and the said lord warden shall, without delay, produce such statement to the council or commissioners or principal officers of the said duchy, who have authority to require the removal of the vice warden from his office: provided also, that in case of sufficient cause being at any time shown to such council or commissioners or principal officers, a majority of five of them the said council or commissioners or principal officers as aforesaid, of whom the said lord warden, if he be present, shall be one, may appoint a fit person, being a barrister of ten years' standing at the least, to execute the duties of the vice warden for a time not exceeding four calendar months together.

ness of the
vice warden
or other
good cause.

Vice warden
to state the
cause there-
of.

A person
may be ap-
pointed to
execute the
duties for a
time.

VIII. And be it enacted, That if any person be in custody for contempt, or be alleged to be in contempt of any order or decree of the said vice warden, or be in custody for any cause relating to his said Court, when the same Court is not sitting, such person shall, by order of the Court, be brought before the vice warden or registrar, who shall hear the defence or allegations of such person, and thereupon the said vice warden may commit, or the said vice warden or registrar may, in their discretion, respectively discharge such person altogether, or may otherwise discharge such person until the next sittings or for some shorter period, on such person so discharged giving good security for his appearance at the next sittings or the expiration of such shorter period, and on such other terms as the nature of the case may require: provided always, that if such security be forfeited the vice warden may thereupon order what shall appear to be just, and give relief accordingly.

Vice warden
or registrar
of the Court
of the Stan-
daries may
in certain
cases com-
mit or dis-
charge any
person in
contempt.

IX. And be it enacted, That the said registrar may make orders respecting errors and amendments in pe-

The regis-
trar may
make orders

relating to
formal
errors and
amend-
ments.

titions or other pleadings at law as well as in equity before any defendant shall have pleaded or answered; and in like manner may at any time make orders respecting formal amendments or misnomers, or the adding or striking out names of parties, and may, by consent of all parties, plaintiffs and defendants, make orders respecting any other amendments after a defendant shall have pleaded, and may from time to time require from any officer of the said Court who shall collect or receive money, either by assessment on ores or by fees of Court, or in course of a suit or otherwise, an account and payment of such money to be made to him at such time as he shall think fit.

Workmen in
mines re-
moving or
concealing
ore to de-
fraud the ad-
venturers or
other miners
to be guilty
of simple
larceny.

X. And for the prosecution and punishment of frauds in mines by idle and dishonest workmen removing or concealing ore for the purpose of obtaining more wages than are of right due to them, and thereby defrauding the adventurers in or proprietors of such mines, or the honest and industrious workmen therein, be it enacted, That if any person or persons employed in or about any mine within the county of Cornwall shall take, remove, or conceal the ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud the proprietor or proprietors of or adventurer or adventurers in such mine or any one or more of them respectively, or any workman or miner employed therein, then and in every such case respectively such person or persons so offending shall be deemed and taken to be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.

Form of Lease of Metals, with license to dig, use of water, &c.

THIS INDENTURE is made the day of A.D.
Between A. B. of in the county of Esquire, of
the one part, and C. D. of in the said county of
mining proprietor of the other part: Witnesseth, that in consideration of the rents, dues, payments, covenants, conditions and agreements, hereinafter mentioned on the part of the said C. D. his executors, administrators, and assigns to be paid, done, observed, and performed, he the said A. B. hath given, granted and demised, and by these presents doth give, grant and demise unto the said C. D., his executors, administrators and assigns, all copper and all other ores, metals or minerals, (except coals) to be found in, under, and throughout the lands and premises comprised within the limits hereinafter described (that is to say) all those several messuages, &c., in the occupation of the said A. B., and E. F. his tenant, all situate, lying, and being within the parish of in the county of aforesaid, together with full and free liberty, license and authority to dig, mine, work and search for the same and to raise and bring to grass all such copper, and other metals and minerals (except coals) as shall be there found, and discovered, and (subject to the covenants, conditions, and agreements hereinafter contained) to carry away and convert the same, to his and their own use and uses, and at his and their wills and pleasure to pass and repass, carry and recarry, and to drive, dig, work, and make any new or other adit or adits, shaft or shafts, pits, drifts, leats, and watercourses in, over, upon, and through any part of the said premises, and to use those already made and driven, and to erect thereon any shed or sheds, mill or mills, engine or engines, or other buildings as he, the said C. D. his executors, administrators or assigns shall, from time to time, think necessary and convenient for the more effectually working the premises aforesaid, and for working, washing, dressing, cleaning, manufacturing, bringing about, and making merchantable, such copper and other ores, metals and minerals (except coals) as shall be found, discovered or gotten within the premises aforesaid, together also with the use of all such water and waters running through, or to be taken up within the limits of the premises hereinbefore described, so far only as he, the said A. B., can or may lawfully grant the same, and so far only as the use of such water and waters, by the said C. D., his executors, administrators and assigns, for the purposes hereinafter mentioned, shall not operate so as to hinder or obstruct any other person or persons now having the enjoyment of the same

water or waters from the use and benefit thereof, as fully and effectually, as such person or persons are now accustomed to use and enjoy the same, such water and waters intended to be hereby granted to be used and employed by the said C. D., his executors, administrators or assigns, only in the working of any engine or engines, or machinery already erected, or to be erected on the premises hereby demised for the working thereof, and for dressing the ores that may be obtained therefrom, and not for working any mine out of the premises hereby demised, or for any other purpose whatever, excepting and reserving to the said A. B., his heirs and assigns, and the tenant or tenants, occupier or occupiers for the time being, of the said several lands and tenements, called &c., and all other the tenements of the said A. B., sufficient water for pot water, and the use of cattle at all times, and for irrigating the said several lands and tenements, and also, excepting and reserving unto the said A. B., his heirs and assigns, or his or their lessees, or grantees, workmen and agents free liberty, at all times during the term hereby granted, to make and drive from any part of the grounds comprised within the limits of the present grant at or above the level of the deepest level therein any adits or drifts, with necessary shafts, into any other lands of the said A. B., his heirs or assigns, and to keep open, repair, and use the same adits, or drifts and shafts, and the like liberty to convey water, and make any watercourses or leats in, from, or over the said ground or any part thereof, doing thereby no damage, hindrance, or prejudice to the working of any mine on the premises hereby intended to be demised, and making reasonable compensation for such damage, hindrance, or prejudice, if any such shall happen : To have and to hold, use, exercise, and enjoy all and singular the several powers, liberties, and authorities hereby granted or intended so to be (excepting, and reserving, and subject as aforesaid) unto the said C. D., his executors, administrators and assigns, from the day of the date of these presents for and during the term and time of years, now next ensuing, and fully to be complete and ended, he, the said C. D., his executors, administrators, and assigns yielding, paying, and rendering to the said A. B., his heirs, executors, and assigns, for and during the first seven years of the said term hereby granted, one clear th part of the money from time to time to be produced, by sale of the copper and other ores, metals, and minerals obtained within the limits aforesaid, subject only to such a deduction as shall be equivalent to the actual charges of conveying one th part of the said copper and other ores, metals and minerals from the said mines to the place appointed for the delivery of the same to the smelter or purchaser thereof, and during the last fourteen years of the said term hereby granted, one clear th part of the money from time to time to be produced by a sale of the copper and other ores, metals and minerals obtained within the limits as aforesaid ; and the said

C. D. doth hereby for himself, his executors, his administrators and assigns covenant, promise, and agree with, and to the said A. B., his heirs and assigns in manner following;— (that is to say) that he the said C. D., his executors, administrators, or assigns, shall and will from time to time, and at all times during the said term, make or cause to be made, proper, regular and correct entries in a book or books to be kept for that purpose, at his or their counting-house or usual place of business on the premises within the limits of this grant, to be open at all times to the inspection of the said A. B., his heirs and assigns, and his and their steward, agent, or toller for the time being, of all copper and other ores, metals and minerals, which shall be made merchantable and carried off from the said premises as aforesaid, and the particulars of each and every sale thereof, and permit copies of such entries to be made and taken by or for the said A. B., his heirs or assigns, and shall and will also within three calendar months next after the sale of any copper or other ores, metals or minerals, gotten or found within the limits of this grant, well and truly render and pay unto the said A. B. his heirs or assigns, his or their dues payable thereon after the rate and in manner aforesaid, without any deduction or abatement whatsoever, except only such deduction as aforesaid, and that he, the said C. D., his executors, administrators and assigns, shall and will at their own expense, and with all reasonable expedition, properly spall, dress, stamp, wash and render perfectly merchantable and fit for sale all such copper and other ores, metals and minerals, which shall be found, dug, or raised within the limits of the grant hereby made; and also, shall and will once, at least, in every three calendar months during the said term, make sale of all such copper and other ores, metals and minerals as shall be dug, raised, and made merchantable and fit for sale on the said demised premises, and shall and will if thereunto required by the said A. B., his heirs or assigns, from time to time give unto him or them, or to his or their known agent or toller for the time being, full three days' notice in writing, of his or their intention to remove any copper or other ores, metals or minerals from the premises within the limits of this sett or any part thereof before notice thereof be given as aforesaid; and also that he the said C. D., his executors, administrators or assigns, shall and will with all possible expedition, and with, at least six able miners constantly on all lawful working days, (except usual holidays) continue to work, search, and dig for copper, and other ores, metals, and minerals in and upon the premises hereby granted, unless hindered by extremity of water, or other unavoidable accident, it being fully understood that the number of men aforesaid shall be employed in sinking or driving in search of ores, and raising the same to the surface, and not to include those employed at grass or surface work; and also shall and will at all times during the said term hereby granted, work

and carry on the mine or mines on the premises hereby demised, regularly and effectually, and in every respect according to the most approved modern practice of good miners, and bind and secure, and keep open in a firm, secure, durable, and minerlike manner all adits, shafts, and other workings which have been already cleared or newly driven, or at any time hereafter shall be cleared or newly driven, sunk or made within the limits of the sett hereby granted, and the same in good repair, and so bound, secured, and kept open as aforesaid, and the whole of the mine and mines in a regular course of working, according to the most approved modern practice of good miners, and in good order for the future prosecution thereof, shall and will at the end or other sooner determination of the said term, quietly and peaceably leave and yield up, together with all erections and buildings now on the said premises, other than machinery, and which he, the said C. D., hath already erected or built, or that he, his executors, administrators or assigns, shall or may hereafter erect and build upon the said premises, and shall and will, in every year, if required, at his and their own expense, provide and deliver unto the said A. B., his heirs or assigns, a correct plan of the mine or work, or mines or works on the said demised premises, and of all lodes and veins which shall have been discovered therein, and from time to time, and at all times during the said term hereby granted, permit and suffer the said A. B., his heirs or assigns, or his or their steward, agent or toller for the time being, to go down, come up, measure, dial and inspect all or any shaft or shafts, adit or adits, drift or drifts, work or works which at any time or times shall or may be dug, sunk, driven, or wrought in or upon any part of the said demised premises, and for that purpose to make use of the tackle, windlasses, ropes, buckles, kibbles, ladders, and all, and every other implements and utensils for the doing thereof: provided that if any such lode or lodes, vein or veins of copper or other ores, metals or minerals shall continue to be unwrought whilst others shall continue to be wrought, it shall be lawful to and for the said A. B., his heirs or assigns, after six months' notice in writing to be given by him or them to the said C. D., his executors, administrators, or assigns, and such lode or lodes, vein or veins shall, notwithstanding such notice, remain unwrought as aforesaid, to enter upon the lode or lodes, vein or veins, any or either of them which shall be so left and continue unwrought, and to repossess and enjoy the same (without prejudice nevertheless to the grant hereby made of all other lodes and veins) as if these presents had not been made and executed, unless the said C. D., his executors, administrators or assigns shall have been hindered by an extremity of water or other unforeseen impediment; and also that he the said C. D., his executors, administrators or assigns shall and will bear, pay, and discharge the land tax, and all other rates, taxes, charges, and assessments that shall or may be rated,

taxed, charged, or assessed upon the dues hereinbefore reserved, or on the said A. B., his heirs or assigns, in respect thereof, during the term hereby granted (except property tax): and also, that he the said C. D., his executors, administrators and assigns, shall and will carefully preserve and lay aside in heaps, separate and apart from stones and other rubbish, all the mould or soil that shall be dug up or which would but for previous removal be covered by the lodgment thereon of stones and rubbish arising in the prosecution of the working of the mine or mines hereby demised, and make good and sufficient fences around every shaft and open parts of adits, which shall be made, sunk, or driven within the limits of the sett hereby granted, and make and keep in repair proper bridges or passes, at such and so many places as may be necessary for the convenient passage of carts, waggons, and cattle at all times over all and every leats and leat or open adits and adit that shall be made on the said premises by virtue of this grant, and shall and will fill up all cuseen pits and shoad pits that he or they shall make in any of the ground comprised within the limits of this sett when, and immediately after they shall have ceased working therein, and in exercising and using the liberties and powers hereby granted and shall and will do or permit to be done to the lands and premises over which this sett extends as little damage as possible: And also shall, and will well and sufficiently repair every hedge, gate, stile, and fence, which he or they may injure or destroy, and make satisfaction and amends for all damage and injury which he or they may make or occasion to the said A. B. his heirs or assigns, tenant or tenants, or occupiers of the said lands, and all and every other person whatsoever in the carrying on or working the mine or adventures, or mines or adventures hereby demised, and in respect thereof during the said term hereby granted, and also for all damage or injury whatsoever, which shall or may be done to any of the buildings, trees, coppices, or plantations, in or upon the sett hereby granted, by opening or working such mines, adits, or shafts as aforesaid, or by any other means relating thereto or connected therewith; and the said C. D., doth hereby for himself, his executors, administrators and assigns, further covenant with the said A. B., his heirs and assigns, that he the said C. D., his executors, administrators, and assigns, shall and will use all reasonable and proper means to carry off the water arising or to arise from the shafts, drifts, and adits of the mine or mines hereby demised and from all parts of the works thereof or connected therewith so as to prevent such water from being or becoming prejudicial or injurious to any other water or to any lands of the said A. B., his heirs or assigns, or any other person or persons whatsoever: provided always, that in case of breach, failure, or neglect made, done, or committed by the said C. D., his executors, administrators, or assigns, in any or either of the covenants, articles, payments, restrictions, limitations, exceptions, conditions and agreements herein contained, and which

on his or their parts are or ought to be paid, done, observed, and performed, and in case satisfaction shall not have been made for the same within three months next after such breach, and after notice and demand made for such satisfaction, that then, and from thenceforth for any or either of the causes aforesaid, it shall and may be lawful to and for the said A. B., his heirs or assigns, into and upon the said premises hereby demised or any part thereof, in the name of the whole to re-enter, and the same to have again, repossess, and enjoy, as in his and their first and former estate, and the said C. D., his executors, administrators, and assigns, and all other occupiers thereof, thereout and thence utterly to expel, turn out, and remove, anything herein contained to the contrary thereof in anywise notwithstanding; and the said A. B. doth hereby for himself, his heirs, and assigns, covenant, promise and agree to and with the said C. D., his executors, administrators, and assigns, in manner following, (that is to say), that he the said C. D., his executors, administrators, and assigns, by and under payment of the dues and other payments, and due performance of all the covenants, conditions, provisoes, and agreements hereinbefore contained shall and lawfully may, from time to time, and at all times during the continuance of the term hereby granted, peaceably and quietly have, hold, use, occupy, possess and enjoy all and singular the several powers, liberties, licenses, authorities, privileges and premises hereby granted, or intended so to be, with their appurtenances (except as before excepted) without the lawful let, suit, trouble, hindrance, or denial of or by the said A. B., his heirs or assigns, or any other person or persons whatsoever: provided lastly, and it is hereby further agreed and declared, by and between the said parties to these presents, that in case the search for ores, metals, and minerals should prove unsuccessful, and the said C. D., his executors, administrators, or assigns shall be desirous to determine his or their tenancy, and thereof shall give notice in writing to the said A. B., his heirs or assigns, or his or their known agent or steward, full six calendar months before the 25th day of March in any year, of the term hereby granted, and do and shall previous to the expiration of such notice, fill up or toller over in a substantial and proper manner all open adits, pits and shafts, and at the expiration of such notice do, and shall pay all dues, compensation for damages, and other demands that shall or may be then due to or unsettled with the said A. B., his heirs or assigns, tenant or tenants, and having so paid all such dues, compensation for damages, and other demands, then and in such case, and from and immediately after the expiration of such notice, these presents, and every clause, article, matter and thing herein contained shall cease, determine, and be void.

In witness whereof the said parties to these presents, (written on skins of parchment, duly stamped,) their hands and seals have set, the day and year first written on the first skin hereof.

A. B.

C. D.

A covenant to submit matters in dispute between the parties to arbitration, is not uncommon. The following may be the form of such covenant :—

“ And the said A. B. doth hereby for himself, his heirs, and assigns, covenant with the said C. D., his executors, administrators, and assigns, and the said C. D., doth hereby for himself, his executors and administrators, covenant with the said A. B., his heirs and assigns, in manner following, (that is to say) that if any difference shall, at any time, arise between the said A. B., his heirs or assigns, and the said C. D., his executors, administrators, or assigns, in anywise relating to any compensation to be made to the said A. B., his heirs or assigns, or the tenant or tenants, or occupiers of the said lands in the carrying on or working the said mine or mines, or adventures hereby demised, or in respect thereof for any damages, repairs, destruction or injury of any kind whatsoever; then, as often as the same shall happen, such difference shall, at the request of the said A. B., his heirs or assigns, or of the said C. D., his executors, administrators or assigns, be reduced into writing, and be referred to the award of three indifferent persons, two to be chosen by the persons differing as aforesaid, and the third by the persons first chosen, within fourteen days after such request, and the award of such three persons, or any two of them, in the matter referred to them, shall be conclusive upon the said parties, if made in writing within one calendar month after all the said three persons shall have been elected as aforesaid, or within such further reasonable time as the said arbitrators shall appoint for making the award; and that if either of the said parties shall refuse or neglect to choose an arbitrator on his or their behalf, for the space of fourteen days after the other of them shall have requested him or them to do so, it shall be lawful for the person chosen arbitrator, by the person or persons making such request to choose an arbitrator on the part of the person or persons refusing or neglecting, whereof notice shall be immediately sent to the person or persons refusing or neglecting, and that the two persons chosen arbitrators as last aforesaid, shall choose an umpire, and the award or umpirage of the persons so chosen as lastly hereinbefore mentioned, or any two of them, shall be as effectual and conclusive as if the person chosen arbitrator by the arbitrator of the person or persons requesting as aforesaid, on behalf of the person or persons refusing or neglecting as aforesaid, had been actually chosen by him or them, and that for the better enforcing any award to be made as aforesaid, the reference or submission in respect of the same shall be made a rule of any of her Majesty's Courts of record at Westminster, pursuant to the statute in that case made and provided, if the Court so thinks fit.”

RULES AND REGULATIONS
OF THE
STANNARIES COURTS.

The Thirteenth day of December in the Year of Our Lord one thousand eight hundred and thirty-six.

Whereas it is provided by the statute 7 & 8 Wm. 4, c. 106, That the vice warden of the Stannaries of Cornwall, shall have power and authority from time to time, and as often as circumstances shall require, to make and prescribe such rules and orders touching and concerning the forms and manner of proceeding in the Court of the vice warden, and the practice and pleadings in all matters to be brought therein, the process of the said Court and the mode of executing the same, the fees reasonable to be demanded by attorneys, solicitors and others, and by the officers of the said Court for business by them transacted in the said Court, and such other rules, orders, and regulations as shall from time to time seem necessary and proper for expediting the business of the said Court, with most convenience and at most reasonable expense to the parties concerned therein. Provided that the rules, orders, and regulations so at any time made by such vice warden are not inconsistent with the said act, or any provisions therein contained, and that such of them as apply to the common law side of the said Court, be approved of by a Judge of one of the superior Courts of common law at Westminster, and provided always that such rules and orders when so approved shall be transmitted to one of his Majesty's principal secretaries of state to be laid before both houses of parliament within one month from the making thereof if parliament be then sitting, or if parliament be not then sitting within one month from the commencement of the then next session of parliament. It is therefore ordered by the vice warden of the said Stannaries, that the following rules and orders applying to the common law side of the said Court, and made pursuant to the said statute and approved of as hereinafter is mentioned shall be in force.

GENERAL RULE.

The hours of attendance at the registrar's office and at the secretary's office, shall be from ten o'clock in the forenoon till two o'clock in the afternoon.

RULES applicable to certain actions for the Recovery of Small Debts.

I. From and after the nineteenth day of January next, all actions of debt on simple contract to the amount of ten pounds, and all actions of assumpsit to the like amount, which shall be prosecuted on the common law side of the Court of the vice warden of the Stannaries of Cornwall, shall be prosecuted by the plaintiff therein entering at the office of the secretary or the vice warden, a plaint in writing containing his name and place of abode, and the name and place of abode of the defendant if the same be known, the amount of the demand, the cause whereby, and time or times when such demand occurred, which plaint shall be in substance according to the form in the schedule to these rules annexed.

II. The plaintiff after he has entered his plaint, shall obtain a summons from the office of the secretary to the vice warden, wherein shall be fully specified the time and place at which the vice warden will hold his Court, and where the defendant is required to appear and answer to the plaint, and that in default of his entering his appearance and answering at such court, judgment will be entered against him for the demand in the plaint contained, which summons shall be in substance according to the form in the schedule to these rules annexed, and shall together with a copy of the plaint, be served on the defendant nine days exclusive before the day on which the vice warden's Court, at which the defendant is to appear is held.

III. Delivery of a summons and copy of a plaint to a defendant at any place, or to his wife or servant at his house, or usual place of abode, trading or dealing together with information to his wife or servant when the summons and copy of the plaint is so delivered of the purport thereof shall be deemed good service.

IV. A defendant will not be allowed to rely at the trial as a defence to the action on any payment by him of money into Court, unless he shall have given notice thereof to the plaintiff four days exclusive before the day of appearance.

V. A defendant will not be allowed to give evidence of any set-off at the trial, unless he shall have given notice to the plaintiff of such set-off, its amount, the cause whereby, and the time or times on or about which it accrued four days exclusive before the day of appearance.

VI. A defendant will not be allowed at the trial to object that another or others jointly answerable with himself, is or are

not sued jointly with himself, unless he shall have pleaded such matter in abatement according to the provisions of the statute 3 & 4 Wm. 4, c. 42, s. 8, and shall have delivered a copy of such plea to the plaintiff four days exclusive before the day of appearance.

VII. On the day mentioned in the summons the defendant shall enter his appearance, and shall appear in Court in person or by counsel or attorney, and thereupon the defendant shall be required to answer the plaint, and on answer being made, the cause shall be tried in a summary way, and thereupon a verdict shall be found and judgment given without further pleading or formal joinder of issue.

VIII. If a defendant be absent from Court and his absence be not sufficiently excused, or being present shall neglect or refuse to answer on proof of the due service of the summons, and of the copy of the plaint, and that the demand in the plaint is just, a verdict shall be found for the plaintiff, and judgment shall be given against the defendant for such demand, or for so much as may be just, and for the costs incurred by the plaintiff in prosecuting his suit.

IX. If the defendant in person or by his counsel or attorney shall appear in Court, and the plaintiff do not appear, nor sufficiently excuse his absence, or having appeared shall not prosecute his suit, judgment shall be given against the plaintiff for the costs incurred by the defendant.

X. A plaintiff against whom any judgment for costs shall have been given, shall not enter any fresh plaint against the defendant until he shall have satisfied the said judgment, unless it shall be otherwise ordered by the Court.

XI. Where a verdict shall have been found for a plaintiff, judgment for his costs as well as for the sum recovered by the verdict shall be entered up against the defendant, except as in these orders is otherwise provided, and where a verdict shall have been found or judgment given against a plaintiff, judgment shall be entered up against him for the defendant's costs, except as in these orders is otherwise provided, and thereupon unless such judgments respectively be satisfied, process of execution in the nature of *feri facias* may be issued in the form in the schedule to these rules annexed, subject to any order which may be made by the Court, which process shall be directed to a bailiff of the Court, who shall take the goods of the party, against whom such process shall issue if they be found within the Stannaries of Cornwall to be dealt with according to law.

XII. All fees on issuing process of execution shall be paid by the party suing out the same, and all costs when taxed, and the expenses of execution indorsed on such process shall be levied thereby.

XIII. If there shall be cross judgments between the parties, execution shall be issued on the judgment for the larger sum, for so much only as shall remain after deducting the smaller sum, and satisfaction for the remainder shall be entered up as well as

satisfaction on the judgment, for the smaller sum, and if both sums be equal, satisfaction shall be entered up on both judgments.

XIV. The Court may make orders for giving time to a plaintiff or defendant, to proceed in the prosecution, or defence of his suit and touching the costs and amount thereof, and how and when any sum recovered by judgment of the Court shall be paid, so that in no case shall the time of payment according to such order exceed three calendar months from the date of the judgment.

XV. If any order touching the time or mode of payment of any sum recovered by judgment of the Court be made, and if default be made in payment according to such order, execution shall be issued immediately on default, against the goods of the party so making default, for the whole sum recovered by the judgment which remains unpaid.

XVI. Every bailiff to whom it shall be given in charge to execute any process of execution, by virtue of these orders shall return the said process together with a statement in writing, of what has been done thereon to the Registrar of the Court of the vice warden without delay.

XVII. No fees shall be taken by any officer of the Court, nor shall any fees be allowed in taxation for or against either party in any action mentioned in the first rule, except such fees as are mentioned in the schedule to these rules annexed.

XVIII. The plaintiff shall not be allowed to divide any cause of action, into two or more suits for the purpose of bringing the same within the provisions of these orders, but any plaintiff having cause of action exceeding the sum of ten pounds, which if not exceeding such sum might be sued for within the said provisions, may on giving a written notice to the defendant, that he abandons the excess sue for the residue according to the said provisions, and such plaintiff by so suing shall be deemed and taken to have abandoned such excess, and the same shall not be sued for.

XIX. These orders apply to all such actions mentioned in the first rule, as shall be commenced within six calendar months after the nineteenth day of January next, and after that day to all such actions, as shall be commenced within three years after the cause of action shall have accrued. These orders do not apply to any action otherwise commenced, nor to any action wherein the title to freehold, or copyhold, or lease for years, or tithe, toll, fair, market, or other franchise, or to any bounds, or within any title under any fiat or commission of bankruptcy is in question.

We do approve of these rules, and of the forms and table of the fees in the schedule to these rules annexed. In testimony whereof we have hereunto set our hands this thirteenth day of December, in the year of our Lord 1836.

N. C. TINDAL,

Lord Chief Justice of the Court of Common Pleas.

J. PARKE,

One of the Barons of the Court of Exchequer.

J. PATTESON,

One of the Judges of the Court of King's Bench.

SCHEDULE.—FORM OF PLAINT.

Stannaries of Cornwall, to wit. A. B. of [place of plaintiff's residence or trade] complains that C. D. of [place of the defendant's residence or trade if known] owes him [the sum claimed] for goods sold and delivered [or for money lent, or work and labour or the use and occupation, or the like as the case may be] on or about the day of in the year.

FORM OF SUMMONS.

Stannaries of Cornwall, to wit. C. D. you are hereby summoned to appear in person or by your counsel or attorney, at the Court of the vice warden of the said Stannaries, to be held at Truro, on the day of next, to answer the complaint of A. B. left herewith, and if you do not then and there enter your appearance, and answer the same complaint, judgment will be entered against you for the demand in the said complaint, containing together with all costs.
By the Court.

L. S.

FORM OF FIERI FACIAS.—A. B. against C. D.

Stannaries of Cornwall, to wit. The lord warden of the said Stannaries to my bailiff greeting, These are in his Majesty's name to require you that of the goods and chattels of [the name of the plaintiff or defendant, as the case may be] you cause to be made, the sum of which in the Court of the vice warden of the said Stannaries was adjudged to him, and have you the said sum at the office of the registrar of the said Court at Truro, without delay to be rendered to the said [name of plaintiff or defendant].
L. S.

TABLE OF FEES.

	£.	s.	d.
To the attorney in respect of all charges as attorney shall be allowed a sum not exceeding . . .	1	0	0
The advocate in the cause shall be allowed as a fee on the trial . . .	0	10	6
To the secretary on entering the plaint shall be paid . . .	0	2	6
For every summons to a witness, and for every witness if more than one included in a summons shall be paid to the secretary . . .	0	0	6
To the registrar for issuing execution, &c. shall be paid . . .	0	5	0
To the crier of the Court on calling on the cause . . .	0	1	0

	£	s.	d.
To the crier of the Court on every motion in a cause for a new trial	0	1	0
To the bailiff of the Court shall be paid for every service of every plaint and summons, and every order or other summons which he shall serve	0	2	0
(This fee is allowed to the bailiff of the Court only when he shall serve the plaint, summons or order.)			
For executing every process in the nature of a <i>f. fa.</i>	0	5	0
For every mile beyond three which he shall travel for the last mentioned purpose	0	0	3
(Such mile is to be counted one way only.)			

The Twenty-first day of December, in the Year of our Lord One Thousand Eight Hundred and Thirty-six.

Whereas it is provided by the statute 7 & 8 Wm. 4, c. 106, that the vice warden of the Stannaries of Cornwall, shall have power and authority from time to time, and as often as circumstances shall require to make and prescribe such rules and orders touching and concerning the forms and manner of proceeding in the Court of the vice warden, and the practice and pleading in all matters to be brought therein, the process of the said Court and the mode of executing the same, the fees reasonable to be demanded by attorneys, solicitors, and others, and by the officers of the said Court for business by them transacted in the said Court, and such other rules, orders, and regulations, as shall from time to time seem necessary and proper for expediting the business of the said Court with most convenience and at most reasonable expense to the parties concerned therein, provided that the rules, orders, and regulations so at any time made by such vice warden, are not inconsistent with the said act or any provisions therein contained, and that such of them as applied to the equity side of the said Court be approved of by the Lord Chancellor of England, and provided always, that such rules and orders when so approved, shall be transmitted to one of his Majesty's principal secretaries of state, to be laid before both Houses of Parliament, within one month from the making thereof if Parliament be not then sitting, then within one month from the commencement of the then next session of Parliament. It is therefore ordered by the vice warden of the said Stannaries, that the following rules and orders, applying to the equity side of the said Court, and made pursuant to the said statute, and approved of as hereinafter is mentioned shall be in force.

I. From and after the first day of January next, all suits by petition which shall be prosecuted on the equity side of the Court of the vice warden of the Stannaries of Cornwall, shall be prosecuted by the plaintiff therein entering his petition at the office of the secretary of the vice warden.

APPENDIX.

II. The plaintiff after he has entered his petition, shall obtain from the office of the secretary of the vice warden, a summons wherein shall be specified the time when the defendant is required to enter an appearance, and when he is required to plead or demur to or answer the petition, and wherein notice shall be given to the defendant of the consequence of his not appearing or not pleading or demurring to or answering the petition which summons shall be in substance according to the form in the Schedule, to these rules annexed, and shall together with a copy of the petition be served on the defendant in person unless the Court shall otherwise order.

III. The plaintiff may, after nine days, exclusive of the day of service of the summons, and copy of the petition on the defendant upon filing an affidavit of personal service thereof, enter an appearance for him at the registrar's office, unless the defendant before such entry shall have entered an appearance there for himself.

IV. The defendant, in case he shall demur for any cause, or shall plead to the jurisdiction of the vice warden's Court, must within fourteen days after his appearance is entered, file his demurrer or plea to the jurisdiction of the Court at the registrar's office, and must in all other cases within twenty days exclusive of the day of his appearance, file his plea, answer to or confession of the petition at the registrar's office, unless further time be allowed by consent of parties, or by order of the Court, otherwise all allegations in the petition, which if not confessed it would be necessary for the plaintiff to prove, shall be taken to be confessed.

V. The answer of the defendant must be in writing, and must confess or deny all allegations in the petition, which if not confessed it would be necessary for the plaintiff to prove. The defendant shall pay the cost of the plaintiff, proving all such allegations, which he shall prove to the satisfaction of the Court, and which it shall be necessary for him to have proved from the same being denied or not confessed, unless the Court shall otherwise order.

VI. After demurrer, plea, or answer, nine days' notice of the hearing a petition by the vice warden, exclusive of the day of notice, shall be given to every defendant by the plaintiff. Delivery of notice to the defendant or to his solicitor, and at the dwelling-house of the defendant, shall be sufficient, unless the Court shall otherwise order.

VII. All rules, orders, and motions requiring cause to be shewn, shall be confirmed and made absolute unless cause be shewn within four days exclusive of the day of service thereof, unless the Court shall otherwise order.

VIII. The vice warden shall, at the commencement of every sitting, name and appoint a day, after which day no petition shall be heard by him for the first time, and after which day no order,

rule, or motion shall be made requiring cause to be shewn at the same sittings, except by permission of the Court.

IX. No fees shall be taken by any officer of the Court, nor shall any fees or costs be allowed in taxation, for or against either party to a suit on the equity side of the Court, except such as are mentioned in the tables of fees or costs to these rules annexed, unless by order of the Court.

X. The hours of attendance at the registrar's office and at the secretary's office, shall be from ten in the forenoon till two in the afternoon.

I do approve of these rules, and of the form in the schedule thereto annexed, and of the table of costs and fees, in testimony whereof I have hereunto set my hand this twenty-first day of December, in the year of our Lord one thousand eight hundred and thirty-six.

COTTENHAM.

L. S.

SCHEDULE.

FORM OF SUMMONS.

Stannaries of Cornwall to wit. C. D. [*name of the defendant*] you are hereby summoned and required to enter your appearance to the petition of A. B. [*the plaintiff's name*], delivered herewith, at the office of the registrar of the Court of the vice warden of the said Stannaries, and in case you do not there enter your appearance within nine days after this day, the said A. B. will there enter it for you, and take notice that within fourteen days after such appearance is entered, you must by yourself, your counsel or attorney, demur or plead to the jurisdiction of the Court of the vice warden, or within twenty days after the day of your appearance, plead to, answer or confess the truth of the petition, left herewith, otherwise the truth of such petition will be taken to be confessed; and take notice, that if you answer the petition, you will be liable to pay the plaintiff's costs of proving the truth of all the allegations therein, which, if not confessed, must be proved by the plaintiff.

The Sixth day of March, in the Year of our Lord One Thousand Eight Hundred and Thirty-seven.

Whereas it is provided by the statute 7 & 8 Wm. 4, c. 106, that the vice warden of the Stannaries of Cornwall shall have power and authority from time to time, and as often as circumstances shall require, to make and prescribe such rules and orders touching and concerning the forms and manner of pro-

ceeding in the Court of the vice warden, and the practice and pleading in all matters to be brought therein, the process of the said Court and the mode of executing the same, the fees reasonably to be demanded by attorneys, solicitors, and others, and by the officers of the said Court for business by them transacted in the said Court, and such other rules, orders, and regulations as shall from time to time seem necessary and proper for expediting the business of the said Court with most convenience and at most reasonable expense to the parties concerned therein. Provided that the rules, orders, and regulations so at any time made by such vice warden are not inconsistent with the said act or any provisions therein contained, and that such of them as apply to the common law side of the said Court be approved of by a Judge of one of the superior Courts of common law at Westminster; and provided always, that such rules and orders when so approved shall be transmitted to one of his Majesty's principal secretaries of state to be laid before both Houses of Parliament within one month from the making thereof if Parliament be then sitting, or if Parliament be not then sitting, within one month from the commencement of the then next session of Parliament. It is therefore ordered by the vice warden of the said Stannaries, that the following rules and orders applying to the common law side of the said Court, and made pursuant to the said statute, and approved of as is hereinafter mentioned, shall be in force.

GENERAL RULES.

I. From and after the 18th day of April next, all Rules, Orders and Motions requiring cause to be shewn, shall be confirmed and made absolute, unless cause be shewn within four days exclusive of the day of service thereof, and unless the Court shall otherwise order.

II. It shall not be necessary to the regular service of any Rule, that the original Rule should be shewn, unless sight thereof be demanded.

III. The vice warden shall at the commencement of every sittings name and appoint a day, after which, no order, rule or motion shall be made requiring cause to be shewn at the same sittings, except by permission of the Court.

Rules respecting Certain Actions.

I. From and after the 18th day of April next, all suits which shall be prosecuted on the common law side of the Court of the vice warden of the Stannaries of Cornwall (except suits for the recovery of small debts which are already provided for by certain rules, taking effect on the 19th day of January last), shall be prosecuted by the plaintiff therein serving a writ of

summons on the defendant in person, which writ shall be issued under the seal of the vice warden, from the office of the vice warden's secretary, and shall be served within three calendar months from the date thereof, exclusive of the day of such date.

II. The writ of summons shall contain the name and place of abode of the plaintiff, and the name and place of abode of the defendant, (if the same be known) and the time and place when and where the defendant is required to appear. And if the said writ be issued by an attorney for the said plaintiff, the name and place of abode of the said attorney shall be subscribed thereon. And where such writ of summons is served for the payment of any debt, or liquidated demand, the amount of the debt or demand and the amount of what the plaintiff's attorney claims for the costs of the writ and service, and attendance to receive debt and costs shall be indorsed thereon together with notice to the defendant, that on payment thereof to the plaintiff or his attorney within four days, exclusive of the day of serving the writ of summons, further proceedings will be stayed. The said writ of summons shall be in substance according to the form in the schedule, to these rules annexed marked No. 1.

III. The defendant shall within nine days of the service on him of the writ of summons, exclusive of the day of such service, cause an appearance to be entered for himself at the office of the registrar of the court of the vice warden, and in default of the defendant so doing, the plaintiff may after such time by his attorney, cause an appearance to be there entered for the defendant, and at the same time the plaintiff's attorney shall file a statement that the defendant has been personally served with the writ of summons, which entry and statement shall be in substance according to the form in the schedule to these rules annexed marked No. 2.

IV. The plaintiff shall be at liberty to file his declaration at the office of the registrar of the Court, as soon as the appearance of the defendant shall have been entered; and if he shall not file his declaration there, and give notice thereof to the defendant within nine days after the time allowed for the defendant to make his appearance shall have expired, judgment of non pros may be signed against him at the registrar's office unless further time be allowed by consent of parties, or by order of the Court.

V. Delivery of notice of the filing of a declaration to the defendant at any place, or to his wife or servant at his house or usual place of abode, trading or dealing, together with information to his wife or servant, when the notice is so delivered of the purport thereof, shall be deemed good service.

VI. The defendant, in case he shall plead to the jurisdiction of the Court, shall, within fourteen days after notice of the declaration being filed, file his plea to the jurisdiction of the Court, at the office of the registrar of the Court, and shall, in

all other cases, within twenty days, exclusive of the day of service of notice of the filing of the declaration file his demurrer, plea to, or confession of the action at the office of the registrar of the Court.

VII. The parties after the expiration of the periods mentioned in the third, fourth, and sixth rules, shall respectively have nine clear days, and no more, for filing at the registrar's office, their subsequent pleadings, and their joinder of issues in law or fact.

VIII. If either of the parties shall fail in filing respectively their plea, replication, or other pleading, within the times stated and allowed in these rules, judgment of non pros, or for want of a plea, as the case may be, may be signed at the registrar's office, unless other or further time be allowed by consent of parties, or by order of the Court.

IX. The filing of the plea and of all subsequent pleading in the office of the registrar of the Court, shall be sufficient notice thereof to the opposite party, and a sufficient demand from him to plead, demur, or join issue, as the case may be.

X. In all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed at once, and enter the similitur.

XI. And whereas the Court of the steward of the Stannaries of Cornwall was held from three weeks to three weeks; and whereas, the Court of the vice warden of the said Stannaries for the entry of pleadings, orders, proclamations, and other matters, touching the practice of the Court in process and execution is at all times open, provided that nothing be therein done on any Sunday, Christmas-day, Good Friday, or any day appointed for a public fast or thanksgiving. It is therefore ordered, that whenever heretofore an interval of three weeks, from Court to Court, was allowed to the parties in a suit, nine clear days shall now be allowed to such parties, unless any other period be expressly provided: and that, whenever any Sunday, Christmas-day, Good Friday, or other day as aforesaid, shall be the last day of any of the periods in these rules mentioned, the day following shall be added to such period.

XII. Notice of trial shall be given nine days exclusive of the first day of the sittings of the vice warden, at which the cause is to be tried, unless other time of notice be allowed by consent of parties, or by order of the Court.

XIII. The defendant may move for a rule nisi for judgment as in case of a nonsuit if the cause be not tried at or before the second sittings of the vice warden after issue has been joined therein.

XIV. For the prevention of unnecessary expense to parties by reason of the length of declarations in actions for debt on simple contract, and upon bills of exchange, promissory notes, and the counts usually called the common counts, it is ordered

that the general rule of all the superior Courts of law at Westminster, made in Trinity term, in the first year of the reign of his present Majesty, and the schedule of forms and directions annexed thereto, with addition of proper averments to give this Court jurisdiction, shall be and is hereby made a rule of the Court of the vice warden of the Stannaries of Cornwall.

XV. To every declaration containing counts in *indebitatus*, assumpsit, or debt on simple contract, the plaintiff shall on filing his declaration, annex full particulars of his demand under those counts, and to every plea of set off the defendant shall, on filing his plea annex full particulars of his set off, unless such particulars shall have been delivered before action brought, or plea of set off pleaded.

XVI. No fees shall be taken by any officer of the Court, nor shall any fees or costs be allowed in taxation for or against either party, to any suit which is the object of these rules, except such fees and costs as are mentioned in the schedule to these rules annexed, unless by order of the Court.

XVII. No costs shall be allowed on taxation to a plaintiff, upon any counts or issues on which he has not succeeded, and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs.

Approved by us the 6th day of March, A.D. 1837.

N. C. TINDAL, *Lord Chief Justice of the Court of Common Pleas.*

EDW. H. ALDERSON, *one of the Barons of the Court of Exchequer.*

J. PATTESON, *one of the Justices of the Court of King's Bench,*

JOHN LUCIUS DAMPIER, V. W.

SCHEDULE No. 1.

Stannaries of Cornwall. The Lord Warden of the said Stannaries to [name and place of abode of defendant if the same be known] greeting. I command you that within nine days of the service hereof, exclusive of the day of service, you do cause an appearance to be entered for you in the Court of my vice warden of the said Stannaries, and at the office of the registrar of the said Court at Truro, in an action on promises [or as the case may be] at the suit of [name and place of abode of the plaintiff] and take notice that in default of your so doing, the said [plaintiff's name] may cause an appearance to be entered there for you, and proceed in the said suit to judgment and execution.

By the Court L. S. this
day of

[If issued by an attorney, the following memorandum must be made on the writ before service thereof.]

APPENDIX.

"This writ was issued by [name and place of abode of the plaintiff's attorney] attorney for the said plaintiff."

[If the said writ be served for payment of any debt or liquidated demand, the following memorandum must be indorsed on the writ before service thereof.]

"The plaintiff claims £ for his debt (or demand) and for costs. And if the amount thereof be paid to the plaintiff or his attorney within four days of the service hereof exclusive of the day of service, further proceedings will be stayed."

No. 2.

Name of plaintiff } The defendant has by himself [or by his
and of defendant } attorney] appeared this day of
or defendants. } 18

Or an appearance for the defendant is entered by A. B., attorney on behalf of the plaintiff, according to the rule, this day of 18

A. B. the attorney for the said plaintiff states that the defendant was personally served with the writ of summons in the said suit, on the day of in the year 18

TABLE OF COSTS.

	£	s.	d.
Letter before action	0	2	0
Instructions for writ or summons	0	3	4
Procuring writ of summons	0	5	0
Service of summons	0	5	0
— if at a distance one shilling a mile allowed, counted one way only			
Attending and searching for appearance, declaration, plea, &c.	0	6	8
Entering appearance	0	5	0
Declaration of personal service	0	3	4
Service of notice of declaration	0	3	0
— if at a distance, one shilling a mile allowed one way only.			
Attending and filing declaration, plea, &c., adding similiter, signing judgment of non pros for want of a plea	0	6	8
Notice of trial	0	3	0
Notice of inquiry	0	3	0
— if at a distance, one shilling a mile allowed one way only.			

APPENDIX.

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	£	s.	d.
Brief—drawing and copy including instructions and examination of witnesses, not exceeding . . .	2	0	0
Advocate's fee, not exceeding . . .	2	2	0
Subpœna	0	5	0
Service of subpœna	0	3	0
— if at a distance, one shilling a mile allowed one way only			
Fi. Fa.—Ca. Sa. or attachment	0	5	0
Instructions for declaration and other pleading . . .	0	3	4
— for affidavit, if special, and not made by the attorney or his clerk . . .	0	3	4
Instructions for writ of inquiry and examining witnesses	0	6	8
Instructions to officer for arrest and attending for warrant	0	3	4
Instructions on motion in court	0	3	4
— to make rule absolute	0	3	4
Drawing declaration and other pleading and affidavits, if special, or folio	0	1	0
If not special, per folio	0	0	8
Making copies where necessary, per folio	0	0	4
Attending with brief on advocate	0	3	4
— on trial	0	13	4
— each day when cause in paper	0	6	8
— to execute inquiry	0	10	0
(The above four fees are not allowed where the attorney is the advocate)			
Attending to tax costs	0	5	0

EXPENSES OF WITNESSES.

When Resident at, or within three miles of Tyuro.

Attornies and medical gentlemen	1	1	0
Farmers and persons in business and trade, captains and pursers of mines, by the day	0	10	0
Labourers, journeymen and others	0	5	0

When Resident more than three miles from Tyuro.

Attornies and medical gentlemen by the day	2	2	0
Farmers and persons in business, captains and pursers of mines, by the day	0	15	0
Labourers, journeymen, and others, by the day	0	7	6

(Exclusive of one shilling a mile travelling, allowed one way only).

If a witness be attending at the same time in more than one cause the above allowances are to be apportioned.

TABLE OF FEES OF COURT.

	£	s.	d.
For a summons	0	3	0
For every search for appearance, declaration, and other pleading	0	1	0
For entering appearance	0	3	0
For filing declaration and other pleading	0	5	0
For signing judgment, discontinuance or retraxit	0	1	0
For a writ of execution or attachment	0	5	0
On taxation of costs	0	3	0
To every juryman on trial or execution of inquiry	0	1	0
To the crier on calling on the cause	0	2	0
For every motion	0	2	0
For filing an affidavit or other document	0	1	0
For office copies of any document per folio of seventy-two words	0	0	4

(1)—FORM OF TRANSFER OF SHARE IN A COST BOOK MINE.

I do hereby for valuable consideration sell, assign, and transfer unto parts or shares of and in a certain mine or adventure called , situate in the parish of , in the county of , together with the like share or proportion of and in all engines, tools, tackle, materials, ores, halvans, monies, and all other appurtenances thereto belonging, together with all dividends and profits in respect of the said part or share , and all interests, privileges and advantages to be derived therefrom.

As witness my hand this day of one thousand eight hundred and

Witness.

I do hereby accept the said shares, subject to the same terms and conditions, rules and regulations as the said held the same.

Witness.

Seemle, that this instrument requires a stamp either as a "conveyance, &c." upon the sale of any lands or other property, or as a "transfer of a share or shares in the stock and funds of any corporation, company, or society whatever, not otherwise charged under the head of mortgage, or of conveyance upon the sale of any property." See 55 Geo. 3, c. 184; schedule—titles "Conveyance and Transfer."

Other forms are also in use.

(2)—FORM OF CERTIFICATE OF TRANSFER.

To Mr. , of , purser of mine,
in the parish of

I for the consideration named and expressed in a deed of transfer, bearing date the do hereby certify that I have assigned, sold and transferred to Mr. part or share of or in the mine or adventure called , situate in the parish of , in the county of , with the like part or share of and in all engines, tools, tackle, materials, ores, halvans, monies in the purser's, treasurer's, and banker's hands, and all other the appurtenances to the said mine, or adventure belonging, together with all and singular, the dividends to be henceforth declared, and payable upon, or in respect of the said part or share , and all interest, profit, right, privileges, and advantages whatsoever incident thereto, or to be derived therefrom; and all the estate, right, title, and interest of me the said in and to the same share belonging; to hold unto the said , his executors, administrators, and assigns, subject to the same rules, orders and restrictions, and on the same conditions as I held the same immediately before the execution hereof.

Witness to the signature }
of the above-named }

I, the said do hereby agree to accept and take the said share , subject to the same rules, orders, restrictions, and conditions. Witness my signature, this day of one thousand eight hundred and

Witness to the signature }
of the above-named }

The undefined state of what is called the cost-book system, and the law respecting it, has suggested to me (and I understand to many other persons more competent to form an opinion on the subject than myself), the expediency of an Act of Parliament, declaratory of what that system is, enforcing publicity of the proceedings of mines professing to adopt it, and of the names of the shareholders in them for the time being. The simple process of winding up such companies adopted by the Stannaries Court, contrasted with the complicated proceedings in the Court of Chancery, encumbered with many nice questions of law, to which the late act for winding up joint stock companies has already given birth, have led me to think that at least within the Stannaries districts, cost-book companies, if properly defined and regulated, might, with advantage, be exempted from its provisions. It has also occurred to me that the provision of a simple process for recovering calls, either in the Superior Courts, the County Courts, or the common law side of the Stannaries Court, would be valuable to mining companies. I venture, therefore, not without much diffidence, to submit to the consideration of persons interested in mining transactions the following sketch of a proposed enactment for the regulation of cost-book mines, as merely suggestive of a measure, which, if it be deemed worthy of consideration, may be matured by those whose practical knowledge is greater than my own :—

An Act for the Regulation of Cost-book Mines.

I. That no mining partnership or company, whether formed before or after this act, shall be deemed a partnership on the cost-book principle within the meaning of 7 & 8 Vict. c. 110, s. 63, unless such partnership shall, if its place of business be in the county of Cornwall, return to the registrar of the Stannaries Court in Cornwall, or if in any other county, to the clerk of the peace of that county—

1st. The name or style of such partnership or company.

2nd. Its place of business.

3rd. The number of shares into which the capital is divided, together with a statement of the names and residences of the shareholders for the time being, and the number of shares held by each.

4th. The name and address of the manager, and the sub-managers (if any).

5th. A declaration that the partnership is formed for the purpose of working a mine or mines on the cost-book system, and a copy of the rules and regulations of the partnership; among which rules and regulations shall be the following :—

(1.) That a general meeting of all the shareholders shall be summoned, by notice in writing to each shareholder by the manager, at least every two months.

(2.) That a shareholder or shareholders whose shares shall amount to parts of the whole number, shall have the power to require the manager to convene extraordinary general meetings.

(3.) That at such meetings each shareholder shall have one vote in respect of each share, and shall be empowered to vote either in person or by proxy.

(4.) That at such meetings a number of votes representing parts of the whole number of shares shall form a quorum for inspecting and passing the accounts of the manager, and transacting the ordinary business of the mine; but that the name or place of business of the company shall not be changed, or the number of shares into which it is divided increased or diminished, a manager appointed or removed, dividends declared, or calls made, except by votes representing the greater number of the shares.

(5.) That any member shall be at liberty to relinquish or transfer his shares on the payment of all calls, on giving notice in writing to the manager, and executing a form of transfer to the effect of that in the schedule to this act, if the share is to be transferred.

(6.) That it shall be the duty of the manager to keep at the place of business of the partnership, a book or books, in which shall be entered the name and place of business of the company, and the number of shares into which it is divided; the names of the shareholders and the number of shares held by each; the account of each with the mine; all transfers of shares; the minutes of all general meetings of the shareholders; and a debtor and creditor account of all disbursements and receipts of the mine, and of all sums owing to it or by it.

(7.) That all shareholders shall be at liberty, at reasonable times, to inspect the said book or books.

(8.) That the manager shall make out once in every month, a list of the names and addresses of the shareholders for the time being, which shall be kept at the place of business, and inspected by any person on the payment of

(9.) That the manager shall make out once in every , a fair balance sheet of the accounts of the mine; and also a report of the works, &c.; which balance sheets and reports shall be submitted to the general meetings of the shareholders.

(10.) That the manager shall convene such meetings, at least once in every two months, by notice in writing to each shareholder, and that he shall convene extraordinary general meetings at the request of shareholders holding parts of the whole number of shares.

(11.) That a majority of the whole number of shares shall have power to appoint a committee with special powers, provided that no such committee shall continue in existence, unless re-appointed, beyond the next general meeting, and that all acts done by them be subject to the review of the next general meeting.

That other regulations, not inconsistent with these, may be made and returned.

II. That all alterations in any of the above matters required to be returned, shall be returned within after made, and that a list of the shareholders, for the time being, shall be returned quarterly.

III. That the company on failing to make such returns shall forfeit , and cease to be a cost-book company until such returns be made.

IV. That if more than months elapse without a general meeting of the shareholders being held, or if elapse on the dismissal of a manager, without the appointment of another, or if the company shall in any material degree depart from the rules and regulations hereby required to be made and returned, the company shall cease to be a cost-book company.

V. That the manager neglecting any of the duties above prescribed shall forfeit .

VI. That the manager, whether he be or be not a partner, shall be empowered to enforce calls, made as hereinbefore provided, by an action of debt in either of the Superior Courts, or County Courts, or on the common law side of the Stannaries Court, and that in such action a production of the list of shareholders kept at the place of business as aforesaid, shall be *prima facie* evidence of defendant being a shareholder; and that the production of the cost book, containing a resolution authorizing the calls, shall be *prima facie* evidence of such calls having been duly made.

VII. Provisions for recovering penalties against the company, or the manager before justices.

VIII. That provisions of 11 & 12 Vict. c. 45, shall not apply to companies formed, or to be formed, complying with the provisions of this act (a).

SCHEDULE.

Form of Returns.—Form of Declaration for Calls.—Form of Transfer of Shares.—Form of Notice to Manager of Relinquishment or Transfer.—Form of Proxy.

(a) I have great doubts whether this exemption should extend to mines beyond the jurisdiction of the Stannaries Court, whose equitable process for winding up cost-book mines, explained in the text, seems to supersede the necessity of the interference of the Court of Chancery. Should it be deemed expedient to extend the jurisdiction of the Stannaries Court to Devonshire or establish a separate Court for that county, the whole district would be comprised in which the cost-book system is *prevalent*, for though not confined to Cornwall and Devonshire, it is believed to be rare in other counties.

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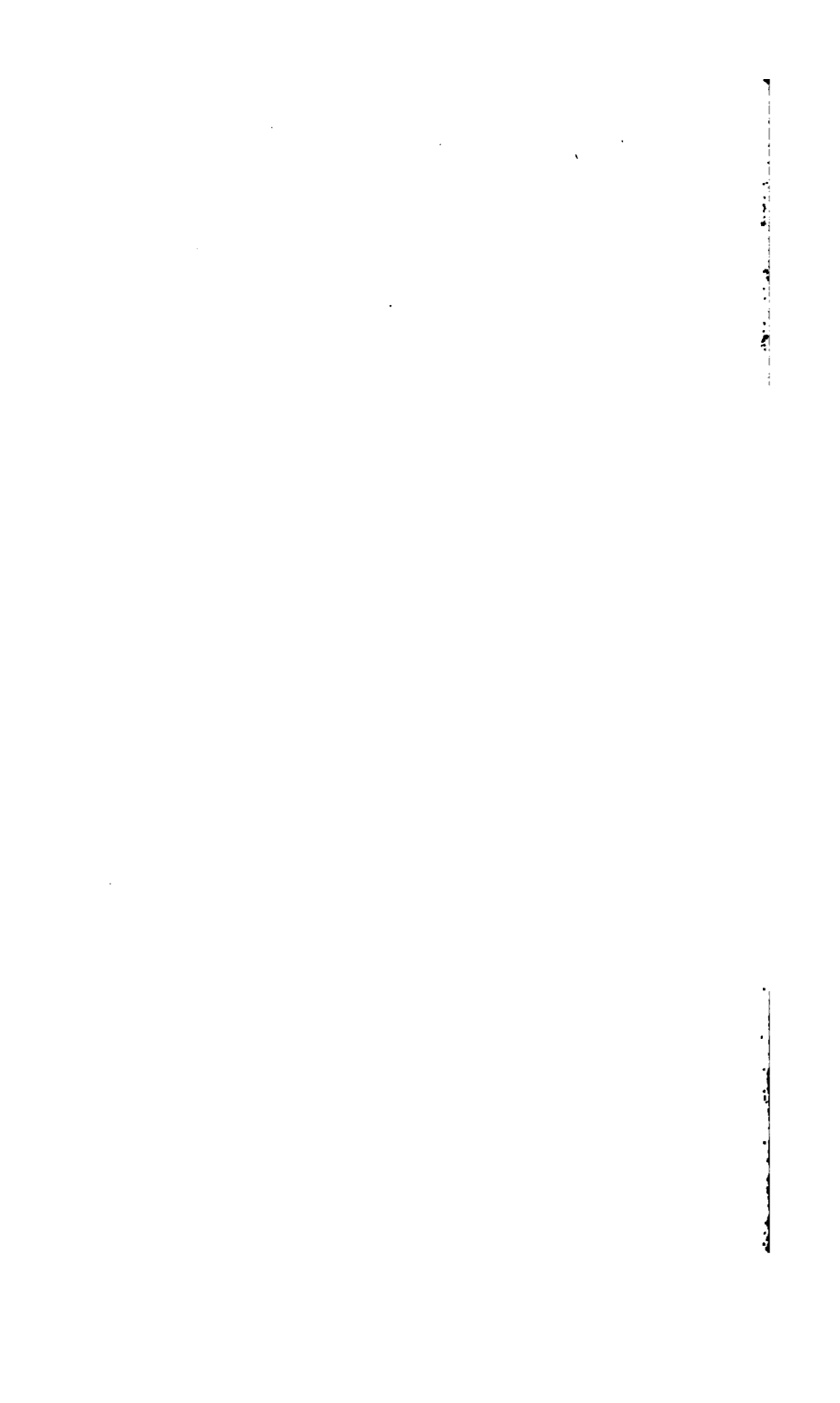
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